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“HELP, I’VE FALLEN AND CAN’T GET UP!” NEW YORK’S APPLICATION OF THE SUBSTANTIAL FACTOR TEST

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INTRODUCTION

Tort law seeks to compensate plaintiffs who are injured by acts or omissions of defendants.¹ Technically, duty, breach, causation and damages are the necessary elements in any negligence claim.² In other words, plaintiffs are required to prove, by a

* J.D. Candidate, St. John’s University School of Law, June 2004. The author, first and foremost, thanks his parents and sister for their unconditional love and support through many years of schooling, in addition to his grandparents, aunts, uncles, brother-in-law, niece, nephews, and cousins for their love and caring as well. Another thank you to Professor Daniel Kramer for his instruction, thoughts and guidance (and grade) in writing this Note and without whom this paper either would not have been written or would not have been written well. In light of that, the author cannot forget to thank the Journal of Legal Commentary staff members, editorial board, and especially the frontliner, for their hard work. Lastly, and most importantly, I dedicate this Note to the memory of my beloved, sweet, caring, and (I can’t forget) utterly adorable grandfather, Ernest Lefkowitz, who passed away this past year and sadly will not see me graduate but will be at my graduation in spirit. I miss you – friends should treat each other the way you treated strangers.

¹ See, e.g., *Smith v. Wade*, 461 U.S. 30, 52 (1983) (instructing the jury in a tort case to find the fair amount that will compensate plaintiff for damages sustained from defendant’s conduct); *Koutsoubos v. Boeing Vertol*, 553 F. Supp. 340, 342 (E.D. Penn. 1982) (quoting *In re Agent Orange Product Liability Litigation*, 506 F.Supp. 762, 793-94 (E.D.N.Y. 1980)) (stating tort liability principles properly seek to impose liability on wrongdoers whose acts or omissions caused injury); Nancy L. Manzer, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628, 651 (1988) (highlighting that tort law traditionally limited compensation to those injured by acts or omissions of another).

² See, e.g., *Denman v. Coppola General Contracting Corp.*, 683 N.Y.S.2d 617, 618 (App. Div. 1998) (setting forth elements of the plaintiff’s cause of action); Martha Chamallas, *Questioning The Use of Race-Specific And Gender-Specific Economic Data In Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 73 (1994) (setting out the four elements of a negligence claim); Richard A. Nagareda, *Turning From Tort To Administration*, 94 MICH. L. REV. 899, 908 (1996) (describing the four elements of negligence as “familiar” in common law).

preponderance of the evidence,³ that a defendant's breach of a duty caused injury to the plaintiff.⁴

The most debated and confusing area of this seemingly simple body of law is causation.⁵ The reason is, that when broken down philosophically, "the cause of an event is the sum of all the antecedents."⁶ Hence, because any one event is the sum of an infinite number of causes how can one, or a few of those antecedents, get singled out as the cause?⁷

The answer is that if the law does not seek to assign blame, then people would not be responsible for their actions and "no tortfeasor would be regarded as the cause of any damage."⁸ Therefore, in order to hold defendants liable the courts have come up with various measures by which to identify legal causation.⁹

³ See, e.g., *Glastetter v. Novartis Pharmaceuticals Corp.*, 252 F.3d 986, 991 (8th Cir. 2001) (stating preponderance of the evidence standard and more likely than not standard are identical and they are both used to assess tort liability); *Murray v. United States*, 215 F.3d 460, 464 (4th Cir. 2000) (quoting *Hurley v. United States*, 923 F.2d 1091, 1094 (4th Cir. 1991)) (explaining negligence law requires plaintiff to prove by preponderance of evidence defendant's breach of duty caused plaintiff's injury); *American Optical Co. v. Weidenhamer*, 457 N.E.2d 181, 183 (Ind. 1983) (commenting that the plaintiff must prove by preponderance of evidence that his injury resulted from a breach of duty owed to him).

⁴ See, e.g., *Silvers v. Silvers*, 999 P.2d 786, 793 (Alaska Ct. App. 2000) (stating what the plaintiff must establish in any negligence case); *Kuhn v. Budget Rent-A-Car*, 876 S.W.2d 668, 672 (Mo. Ct. App. 1994) (explaining the four elements that the plaintiff must establish to prevail in a negligence claim); *Comer v. Tandy Corp.*, 367 S.E.2d 436, 437 (S.C. Ct. App. 1988) (announcing that negligence causes of action arises when the defendant breaches a duty owed to plaintiff, proximately resulting in damage).

⁵ See *Nola M. v. University of S. Cal.*, 20 Cal. Rptr. 2d 97, 109 (Cal. Ct. App. 1993) (noting legal scholars continue to debate meaning of causation in tort law); Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1072 (2001) (stating "[f]ew issues in tort law are more in need of clarification than those encompassed by the concepts of legal cause and duty..."); see also Jane Stapleton, *Legal Cause: Cause-In-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 943 (2001) (suggesting tort law term of "legal cause" is in need of re-evaluation due to its confusing nature).

⁶ Jeremiah Smith, *Legal Cause In Actions of Tort*, 25 HARV. L. REV. 103, 104 (1911) (expounding on John Stuart Mill, in his work on Logic, 9 Eng. Ed., 378-383).

⁷ See *id.* (summarizing John Stuart Mill as concluding "that we have no right to single out one antecedent and call that the cause"); see also *Stewart v. Federated Dep't Stores, Inc.*, 662 A.2d 753, 758 (Conn. 1995) (theorizing that "cause in fact is limitless; 'but for' the creation of this world, no crime or injury would ever have occurred"); RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965) (instructing "substantial" can be used in two senses and that "substantial" is not to be used "in the so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred."). See generally Fleming James Jr. & Roger F. Perry, *Legal Cause*, 60 YALE L. J. 761, 761 (1951) (pointing out that the potential scope of liability is vast because "the causes of causes are infinite").

⁸ See Smith, *supra* note 6, at 104.

⁹ Some of these procedures are the "but for" test, the foreseeability test, the superceding or intervening cause test, the substantial factor test, public policy arguments,

Traditionally, courts understood legal causation to be both factual¹⁰ and proximate.¹¹ However, evolution in the law has confused and muddled the factual and proximate elements of negligence actions by adopting the vague terminology of "substantial factor."¹² Consequently, sympathetic plaintiffs have been able to recover money damages from defendants whose negligence did not cause the plaintiff's injuries.¹³

The focus of this note is to explain why New York must abandon the use of the "substantial factor" test for determining causation. Part I is a synopsis of New York proximate causation principles. At the end of Part I, the author offers five reasons, which form a motif throughout this paper, on why the substantial factor test must be discarded. Part II identifies the origin of the substantial factor test, and the context of how substantial factor

and questions as to proximity of distance, time and space. See *Dale v. E. R. Knapp & Sons, Inc.*, 433 S.W.2d 880, 883-84 (Ky. Ct. App. 1968) (relaying numerous formulae which "have been suggested for determining" causation); see also *Menne v. Celotex Corp.*, 861 F.2d 1453, 1458 (10th Cir. 1988) (showing some states, such as Nebraska, incorporate more than one test of causation); *Point Prods. A.G. v. Sony Music Entm't, Inc.*, 215 F. Supp. 2d 336, 342 (S.D.N.Y. 2002) (explaining how New York courts can sometimes use substantial factor test in place of "but for" test).

¹⁰ Factual causation, cause-in-fact, necessary condition, and *sine qua non* all express the concept of "but for" causation. See RESTATEMENT (THIRD) OF TORTS § 26, cmt. b (Tentative Draft No. 2, March 25, 2002); see also PROSSER & KEETON, LAW OF TORTS § 41 (5th ed. 1984). An action is a cause of a result if but for the act the result would not have occurred; on the other hand, an action is not a cause of a result if the result would have occurred without the action. For an in depth explanation and an enlightening five-step breakdown of "but for" causation see David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1768-75 (1997).

¹¹ See *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) (arguing that what is meant by proximate cause "is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point"); see also *Derdarian v. Felix Contracting Corp.*, 414 N.E.2d 666, 670 (N.Y. 1980) (stating that proximate cause is an elusive concept stemming "from policy considerations that serve to place manageable limits upon the liability that flows from negligent conduct"). See generally WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41 (4th ed. 1971) (describing proximate cause as a term of art signifying the point where legal responsibility attaches for the harm done to another).

¹² See Vern R. Walker, *Direct Inference In The Lost Chance Cases: Factfinding Constraints Under Minimal Fairness To Parties*, 23 HOFSTRA L. REV. 247, 247 (1994) (indicating that the substantial factor jury instruction is vague and lacks guidance); see also *Thompson v. Sun City Cmty. Hosp., Inc.*, 688 P.2d 605, 615-16 (Ariz. 1984) (rejecting the application of the substantial factor doctrine to jury instructions); William V. Dorsaneo, III, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. 1497, 1527 (2000) (describing the substantial factor component of the causation analysis as vague).

¹³ See *infra* Part V; see also *Cavlin v. N.Y. Med. Group*, 730 N.Y.S.2d 337, 338 (App. Div. 2001) (allowing recovery where a doctor's negligence was incidental to the patient's death); *Kallenberg v. Beth Israel Hosp.*, 357 N.Y.S.2d 508, 511 (App. Div. 1974), *aff'd*, 337 N.E.2d 128 (N.Y. 1975); *Birkbeck v. Cent. Brooklyn Med. Group, P.C.*, 2001 N.Y. Misc. LEXIS 368, at *14 (N.Y. Sup. Ct. Aug. 22, 2001) (utilizing, inappropriately, the so-called "loss of chance to survive" theory to compensate plaintiff).

is appropriately used. Part III puts New York's adoption of substantial factor into a historical perspective by identifying important New York case law. When analyzing those decisions, I discuss how the cases probably would have been decided if the defendant's negligence were required to be a condition precedent to the harm incurred by the plaintiff. I further detail how the New York Court of Appeals incorrectly applied the principles imbedded in the Restatement (Second), the authority cited by the Court for using substantial factor. Part IV questions the ambiguity in the meaning of the terminology "substantial factor;" while Part V, through the illustrative use of medical malpractice cases, demonstrates the injustice of solely using the substantial factor test for determining causation. Lastly, in Part VI, I propose a cause-in-fact jury instruction in which I advocate a "but for" rule. It is recommended that this jury instruction be used as an addition to all the other proximate cause tests, like foreseeability, intervening or superceding causes, public policy, and all other arguments that serve to limit liability. In this manner, it is important to note that the focus of this paper is to address the inadequacy of the terminology "substantial factor" when used as an element of causation and that this paper does not address the other elements of proximate cause just herein mentioned.

I. NEW YORK LAW

A. The State of the "But-For" Test

Over the past 100 years, New York's negligence causation principles have gone under a progressive change. New York utilized the "but-for" test, at least in part,¹⁴ from the turn of the 20th century¹⁵ through the 1990's.¹⁶ However, at the turn of the

¹⁴ See, e.g., *Sullivan v. B & A Constr., Inc.*, 120 N.E.2d 694, 696 (N.Y. 1954) (indicating that while a defendant's negligence is a condition precedent to a plaintiff's injury it is not necessarily a proximate cause); *Robbins v. Frohlich*, 106 N.E.2d 65, 66 (N.Y. 1952) (maintaining that "but for" causation is indispensable in compensation claims); *Brown v. New York State Training Sch.*, 32 N.E.2d 783, 783 (N.Y. 1941) (noting that injury must flow "therefrom as a natural consequence" of the plaintiff's work in compensation claims).

¹⁵ See *Berry v. Utica Belt Line St. Ry. Co.*, 73 N.E. 970, 971 (N.Y. 1905) (utilizing "but for" causation in determining plaintiff's contributory negligence); *Moylan v. Second Ave. R.R. Co.*, 128 N.Y. 583, 584 (1891) (noting that to determine proximate cause a jury was

21st century, it is questionable whether the *sine qua non* concept still plays a critical role in causation principles.¹⁷

1. Is “But-For” obsolete?

In 1980, the Court of Appeals when presented with causation issues did not address “but-for” causation, but, instead adopted the substantial factor test¹⁸ and stated that the plaintiff’s burden is “to show that the defendant’s [negligence] was a substantial causative factor in the sequence of events that led to [the plaintiff’s] injury.”¹⁹ Furthermore, both the Second and Third Departments, beginning in the early 1990’s have denounced the use of the “but-for” test.²⁰ The Third Department proclaimed that the “but-for” test is “inconsistent with accepted substantive rules of tort law”²¹ and held that the concept of proximate causation is one and the same as the term “substantial factor.”²²

However, while the current trend in New York on causation

asked to also consider “but for” causation); *Lilly v. New York Cent. & Hudson River R.R. Co.*, 14 N.E. 503, 506 (N.Y. 1887) (equating proximate cause with “but for” causation).

¹⁶ See *Herbert H. Post & Co. v. Sidney Bitterman, Inc.*, 639 N.Y.S.2d 329, 336 (App. Div. 1996) (indicating that to establish negligence there must exist a “but for” causal connection between a plaintiff’s loss and a defendant’s actions); *Minelli v. Good Samaritan Hosp.*, 624 N.Y.S.2d 452, 452 (App. Div. 1995) (utilizing “but for” causation in determining severity of the plaintiff’s damages); *Scott v. Keener*, 588 N.Y.S.2d 946, 947 (App. Div. 1992) (using “but for” causation to establish negligence).

¹⁷ See N.Y. PJI 2:70 (3d ed. 2003) (mentioning only “substantial factor” and not “but for” causation); see also *Hersman v. Hadley*, 651 N.Y.S.2d 754, 757 (App. Div. 1997) (rejecting “but for” causation in relation to jury instructions); *Benaquista v. Mun. Hous. Auth.*, 622 N.Y.S.2d 129, 131 (App. Div. 1995) (utilizing only “substantial factor” causation with respect to jury instructions).

¹⁸ See *Nallan v. Helmsley-Spear, Inc.*, 407 N.E.2d 451, 458 (N.Y. 1980) (using language of “substantial causative factor”); see also *Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 666, 670 (N.Y. 1980) (providing that in order to prove a prima facie case plaintiff must show that the defendant’s negligence was a substantial cause); *Sewar v. Gagliardi Bros. Serv.*, 411 N.E.2d 786, 791 (N.Y. 1980) (utilizing substantial factor causation to validate a finding of negligence).

¹⁹ *Nallan*, 407 N.E.2d at 458.

²⁰ See *Bisceglia v. Int’l Bus. Machs.*, 732 N.Y.S.2d 92, 94 (App. Div. 2001) (rejecting “but-for” analysis as a basis for liability); see also *Hersman*, 651 N.Y.S.2d at 757 (discarding the use of “but for” causation); *Benaquista*, 622 N.Y.S.2d at 131 (rejecting the use of “but for” causation in jury instructions).

²¹ *Penovich v. Schoeck*, 676 N.Y.S.2d 253, 254 (App. Div. 1998).

²² See *Martonick v. Pudiak*, 727 N.Y.S.2d 829, 831, (App. Div. 2001) (holding that “there can be no question” that the terms substantial factor and proximate cause “are synonymous”). See generally *Rotheberg v. Reichelt*, 742 N.Y.S.2d 150, 152–53 (App. Div. 2002) (using substantial factor language in the jury instruction for proximate cause); *Palmateer v. Whitcavitch*, 681 N.Y.S.2d 883, 883–84 (App. Div. 1998) (discussing jury confusion as to the meaning of “substantial factor” in the jury instructions for proximate cause).

issues is to focus solely on substantial factor,²³ "but-for" causation still plays a role. The First and Fourth departments still incorporate "but-for" rationale into causation.²⁴ Moreover, all four Appellate Departments still used the "but-for" test into the 1990's.²⁵ Therefore, it is difficult to ascertain the exact state of the condition precedent requirement in New York case law.

2. "But-For" In Legal Malpractice

There are two areas of law in New York where the "but-for" test is fundamental.²⁶ The "but-for" test is always employed in determining whether a certain occurrence is covered or excluded from insurance coverage.²⁷ Secondly, courts never fail to require

²³ See N.Y. PJI § 2:70 (3d ed. 2003) (focusing on "substantial factor"); see also e.g., *Howard v. Parsons' Child and Family Ctr.*, 761 N.Y.S.2d 381, 383-84 (App. Div. 2003) (using "substantial cause" and not "but for" test in determining whether or not defendant was negligent); *Stewart v. Avasso*, 754 N.Y.S.2d 551, 551 (App. Div. 2003) (holding that plaintiff did not prove a prima facie case because plaintiff failed to prove that defendant's negligence was "substantial cause of the events which produced the injury").

²⁴ See *Murray-Davis v. Rapid Armored Corp.*, 752 N.Y.S.2d 37, 37-38 (App. Div. 2002) (stating that "In this matter, 'but for' defendant's allegedly illegally parked truck, plaintiff would not have had to make lane change which purportedly precipitated accident"); see also *Cantor Fitzgerald Assocs. L.P. v. Tradition N. Am., Inc.*, 749 N.Y.S.2d 249, 249 (App. Div. 2002) (asserting that the essential element of plaintiff's claim for tortious interference with a contract is that "breach of contract would not have occurred but for the activities of the defendant"); *Williams v. Majewski*, 737 N.Y.S.2d 463, 464-65, (App. Div. 2002) (using "but for" in applicability of relation back doctrine).

²⁵ See *Herbert H. Post & Co. v. Sidney Bitterman, Inc.*, 639 N.Y.S.2d 329, 336 (App. Div. 1996) (using but for language, not substantial factor language); *Minelli v. Good Samaritan Hosp.*, 624 N.Y.S.2d 452, 452 (App. Div. 1995) (finding that lower court erred by granting summary judgment because "the jury could have reasonably concluded that, but for the defendants departures from good and acceptable medical practices, the plaintiff's injuries would have been less severe than they were"); *Scott v. Keener*, 588 N.Y.S.2d 946, 957 (App. Div. 1992) (applying "but for" language in determination of contributing cause to accident).

²⁶ See *Silva v. Utica First Ins. Co.*, 755 N.Y.S.2d 433, 434 (App. Div. 2003) (utilizing the "but for" test in insurance coverage action); see also Loren E. Mulraine, *The District of Columbia Court of Appeals Student Project: A SURVEY OF RECENT CASE LAW: Professional Responsibility: The Imminent Peril of Neglecting a Legal Matter*, 33 HOW. L.J. 411, 419 (1991) (enumerating "but for" causation as an essential element in a legal malpractice action in New York); Barry R. Temkin, *Can Negligent Referral to Another Attorney Constitute Legal Malpractice*, 17 *TOURO L. REV.* 639, 643-44 (2001) (discussing how in the context of legal malpractice occurring in litigation, element of causation has been construed to require "but for" causation).

²⁷ See *Mount Vernon Fire Ins. Co., v. Creative Hous.*, 88 N.Y.2d 347, 353 (1996) (applying the "but for" test as the appropriate test for the determination of insurance coverage); *Watkins Glen Cent. Sch. Dist. v. Nat'l Union Fire Ins. Co.*, 732 N.Y.S.2d 70, 73 (App. Div. 2001) (employing the "but-for" test when looking at the nature of the underlying conduct to determine whether the occurrence is covered or excluded from insurance coverage); see also *Marcus v. United States Casualty Co.*, 162 N.E. 571, 573 (N.Y. 1928) (asking whether the insurance policy covered a person who fell down an elevator shaft).

the plaintiff to prove “but-for” causation in legal malpractice.²⁸ This “but-for” requirement in legal malpractice, as opposed to other areas of negligence law, creates an ironic inconsistency.

In legal negligence claims, the courts constantly require an attorney’s carelessness to be a condition precedent to the plaintiff’s harm;²⁹ whereas, in other negligence areas the court eases the plaintiff’s burden by using the less demanding requirement of substantial factor.³⁰ In order to eliminate this discrepancy and afford all defendants the same protection that attorneys afford themselves, New York needs to explicitly reiterate the consistent use of the condition precedent requirement and abandon the substantial factor test.³¹

B. Substantial Factor in New York

Before courts can sever a defendant’s liability by either using the foreseeability test,³² the superceding event test,³³ or any

²⁸ See, e.g., *Britt v. Legal Aid Society, Inc.*, 741 N.E.2d 109, 112 (N.Y. 2000) (requiring, in context of a criminal conviction as the underlying suit, “that the criminal client bear the unique burden to plead and prove that the client’s conviction was due to the attorney’s [negligent representation] and not due to some consequence of his guilt”); *Vooth v. McEachen*, 73 N.E. 488, 489 (N.Y. 1905) (holding, in a suit by a client against an attorney for negligent collection of a claim, that the client bore the burden of proving that “but-for” the attorney’s negligence the claim would have been collected); *Franklin v. Winard*, 606 N.Y.S.2d 162, 164 (App. Div. 1993) (using the “but-for” test in legal malpractice case).

²⁹ See, e.g., *Epifano v. Schwartz*, 719 N.Y.S.2d 268, 269–70 (App. Div. 2001) (establishing a prima facie case for legal malpractice requires “but for” causation); *Rau v. Borenkoff*, 691 N.Y.S.2d 140, 141 (App. Div. 1999) (stating that “In order to establish the elements of proximate cause and damages, a plaintiff must show that but for the attorney’s negligence, he or she would have prevailed on the underlying claim”); *Raphael v. Clune*, 607 N.Y.S.2d 734, 735 (App. Div. 1994) (using “but for” language).

³⁰ See *Mitchell v. Gonzales*, 819 P.2d 872, 877 n.2 (Cal. 1991) (demonstrating that the substantial factor test is less burdensome than the “but-for” test by noting that the defendants insisted the jury instructions on proximate cause be the “but-for” test, while plaintiffs requested the instructions be the substantial factor test); see also *Garrett v. Bryan Cave LLP*, No. 98–6282, 2000 U.S. App. LEXIS 7339, at *1, 5, 10–13 (10th Cir. Apr. 21, 2000) (emphasizing that the plaintiff asserted error in the trial court using the “but-for” test and not the “more relaxed ‘substantial factor’ test”); *Highland Ins. Co. v. Nat’l. Union Fire Ins. Co.*, 27 F.3d 1027, 1031 (5th Cir. 1994) (citing, in the context of finding a possible breach of fiduciary duty, *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 284 (2d Cir. 1992), for the proposition that “the question is not whether the plaintiff has shown but for causation, but whether the plaintiff has satisfied a less demanding ‘substantial factor’ standard”).

³¹ See RESTATEMENT (THIRD) OF TORTS § 26 cmt. j (Tentative Draft No. 2, 2002) (abandoning the substantial factor test); see also John D. Rue, *Returning To The Roots Of The Bramble Bush: The “But For” Test Regains Primacy In Causal Analysis In The American Law Institute’s Proposed Restatement (Third) Of Torts*, 71 FORDHAM L. REV. 2679, 2681–82 (2003) (discussing the resurrection of the “but for” doctrine while repudiating the “substantial factor” test).

³² See *Pinero v. Rite Aid of N.Y. Inc.*, 743 N.Y.S.2d 21, 22 (App. Div. 2002) (reiterating

other test which cuts off liability,³⁴ the courts must first impugn liability on the defendant.³⁵ Traditionally, this was accomplished by requiring the defendant's conduct to be a condition precedent to the plaintiff's harm;³⁶ however, with the decreasing popularity of the "but-for" test, the substantial factor test has been playing this role.³⁷

that foreseeability is an "essential element of a negligence cause of action"); *Gattner v. Coliseum Exhibition Corp.*, 230 N.Y.S.2d 340, 342 (App. Div.1962) (applying the foreseeability test); *see also Amatulli v. Delhi Constr. Corp.*, 571 N.E.2d 645, 648-49 (N.Y. 1991) (announcing that "a manufacturer, who has designed and produced a safe product, will not be liable to injuries resulting from substantial alterations or modifications of the product by a third party which render the product defective or otherwise unsafe" because foreseeability is "inapposite where a third party affirmatively abuses a product by consciously bypassing built in safety features") (internal quotation marks omitted).

³³ *See Perez v. New York Telephone Co.*, 554 N.Y.S.2d 576, 578 (App. Div. 1990) (noting "an intervening act is deemed a superceding cause of the injury so as to relieve the defendants of liability if it is of such an extraordinary nature or so attenuates defendants' negligence from the ultimate injury that responsibility may not reasonably be attributed to the defendants"); *see also Skibinski v. Salvation Army*, 761 N.Y.S.2d 742, 743 (App. Div. 2003) (informing that "a plaintiff's own conduct may be a superceding cause which severs the causal connection between defendant's negligence and the injury"); *Dasilva v. A.J. Contracting Co.*, 694 N.Y.S.2d 353, 354 (App. Div. 1999) (arriving at the conclusion that "The striking of the ladder by a pipe cut during the ongoing demolition was not such an extraordinary event as to constitute a superceding cause and, accordingly, it cannot be said that plaintiff's actions in cutting the pipe were the sole proximate cause of his injuries").

³⁴ *See Pagan v. Goldberg*, 382 N.Y.S.2d 549, 552 (App. Div.1976) (suggesting five tests that can be used as guidelines, including tests of status, temporal duration, spatial duration, foreseeability, and public policy); *see also Bovsun v. Sanperi*, 461 N.E.2d 843, 848 (N.Y. 1984) (adopting the "zone of danger" test to determine proximate causation for claims of negligent infliction of emotional distress); *Belling v. Haugh's Pools, Ltd.*, 511 N.Y.S.2d 732, 733 (App. Div. 1987) (utilizing the "obvious danger" test to sever liability in products liability case based on negligent failure to warn).

³⁵ *See* RESTATEMENT (SECOND) OF TORTS § 431 (1965) (requiring first that an actor's negligent conduct satisfy both "but-for" and substantial factor tests, then subsequently allowing an actor to be relieved of liability by rule of law).

³⁶ *See supra* notes 14-16, and accompanying text; *compare Williams v. Steves Indus., Inc.*, 699 S.W.2d 570, 575 (Tex. 1985), *with Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994) (using phrase "without which no harm would have occurred" to illustrate defendant's conduct as prior in time to resulting harm). *But see DiPonzio v. Riordan*, 679 N.E. 2d 616 (N.Y. 1997) (pointing out that where harm was caused by an occurrence that was not part of the risk or recognized hazard involved in the actor's conduct, the actor is not liable even if the actor's conduct preceded the defendant's injury).

³⁷ *See, e.g., Mitchell v. Gonzales*, 819 P.2d 872, 887 (Cal. 1991) (asserting that substantial factor test "has been comparatively free of criticism and has even received praise"); *see also County of Westchester v. Town of Greenwich*, 870 F. Supp. 496, 501 (S.D.N.Y. 1994) (citing *Coburn v. Lenox Homes, Inc.*, 186 Conn. 370, 384 (Sup. Ct. 1982)) (praising 'substantial factor' test as reflective of inquiry fundamental to all proximate cause questions); William Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 369, 421 (1950) (declaring "As an instruction submitting the question of causation in fact to the jury in intelligible form, it appears impossible to improve on the Restatement's 'substantial factor [test.]'").

No case has been found where the defendant's act could be called a substantial factor when the event would have occurred without it; nor will cases very often arise where it would not be such a factor when it was so indispensable a cause that without it the result would not have followed.

The proximate cause instruction, which is first given to New York juries, provides that a defendant's negligence is the cause of an injury if the negligence was a substantial factor in bringing about the injury.³⁸ Moreover, in order to make out "a prima facie case, the plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury."³⁹

While the substantial factor test has some utility in that it prevents insubstantial or insignificant causes from giving rise to liability,⁴⁰ the test must be discarded.⁴¹ First, the substantial

Abbott Laboratories v. Brennan, 952 F.2d 1346, 1353 (Fed. Cir. 1991).

³⁸ See N.Y. PJI § 2:70 (3d ed. 2003); see also *Rothberg v. Reichelt*, 293 A.D.2d 948, 949 (App. Div. 2002) (ordering new trial due to Supreme Court's failure to charge that portion of Pattern Jury Instructions which provides: "Whether the negligence of a particular party was a substantial factor in causing an injury does not depend on the percentage of fault that may be apportioned to that party"); *Kalam v. K-Metal Fabrications, Inc.*, 286 A.D.2d 603, 604 (App. Div. 2001) (holding that it was not harmless error for trial court to fail to charge jury with entirety of PJI 2:70).

³⁹ *Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 666, 670 (N.Y. 1980).

⁴⁰ See *Culver v. Bennett*, 588 A.2d 1094, 1099 (Del. 1991) (stating substantial factor "proposes to deny liability for insubstantial contributions"); see also *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 361 (3d Cir. 1999) (recanting the district court's jury instruction that "A substantial factor is a real actual factor even though the result may be unusual, unforeseen, unforeseeable or unexpected but it is not an imaginary or fanciful factor having no connection or only an insignificant connection with the injury"); RESTATEMENT (SECOND) OF TORTS § 433 cmt. a (1965) (commenting that "Some other event which is a contributing factor in producing the harm may have such a predominant effect in bringing it about as to make the effect of the actor's negligence insignificant and, therefore, to prevent it from being a substantial factor").

⁴¹ The RESTATEMENT (THIRD) OF TORTS § 26 cmt. j (Tentative Draft No. 2, Mar. 25, 2002), in a search for uniformity, recommends the abolishment of the substantial factor test and a return to traditional 'but-for' causation. Like New York, some states solely apply the substantial factor test. See *Derdiarian*, 414 N.E.2d at 670; see also *Mitchell v. Gonzales*, 819 P.2d 872 (Cal. 1991); *Montalvo v. Lapez*, 884 P.2d 345 (Haw. 1994); *Grayson Fraternal Order of Eagles v. Claywell*, 736 S.W.2d 328, 330-31 (Ky. 1987); *Sherk v. Daisy-Heddon*, 450 A.2d 615, 635 n.13 (Pa. 1982) (Larsen, J., dissenting). All the way on the opposite side of the spectrum, some states hold that the use of the substantial factor test in jury instructions is reversible error as a matter of law. See *Culver*, 588 A.2d at 1099; see also *McDowell v. Davis*, 448 P.2d 869 (Ariz. 1968). The other states, which are in between these extremes, form a rainbow in the plethora of methods employed to determine causation.

Some states explicitly break causation into two elements: factual causation and legal (proximate) causation. See, e.g., *Stewart v. Federated Dep't Stores, Inc.*, 662 A.2d 753, 758 (Conn. 1995); *Skinner v. Square D Co.*, 516 N.W.2d 475, 479 (Mich. 1994). While most states that fall into this category use the 'but-for' test to determine cause-in-fact, there appears to be no consistency as to determining legal (proximate) causation (however, the various terms used by different states may just be using different vocabulary to express the same concept). For example, Alabama applies foreseeability to determine legal (proximate) causation, see *Hilliard v. Huntsville Elec. Util. Bd.*, 599 So. 2d 1108, 1111-12 (Ala. 1992); while Washington uses public policy arguments for legal (proximate) causation. See *Griffin v. West RS, Inc.*, 18 P.3d 558, 562 (Wash. 2001). On the other hand Tennessee employs the substantial factor test, among other tests, to determine legal (proximate) causation, see *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 n.1 (Tenn. 1993); see

factor test is a source of confusion for jurors⁴² and lawyers alike.⁴³ Second, the term "substantial" is ambiguous,⁴⁴

also *Bronson v. Hitchcock Clinic*, 677 A.2d 665 (N.H. 1996). In addition, in South Carolina foreseeability generally determines proximate cause; but, apparently a cause being classified as a substantial factor could override foreseeability. *See* *Thomas Sand Co. v. Colonial Pipeline Co.*, 563 S.E.2d 109, 112-13 (S.C. Ct. App. 2002). Maryland, unlike most other states that fall into this category, applies either the substantial factor test or the 'but-for' test to determine cause-in-fact, *see* *Kassama v. Magat*, 767 A.2d 348, 361 (Md. Ct. Spec. App. 2001); and uses fairness and social policy to establish legal cause. *See* *Baltimore Gas & Elec. Co. v. Lane*, 656 A.2d 307, 315 (Md. 1995).

However, the unpredictability of the application of causation principles runs much deeper as most states do not explicitly use the cause-in-fact/legal (proximate) cause breakdown. For instance, Arkansas defines proximate cause by 'but-for' causation but includes substantial factor language in the assessment of foreseeability. *See* *State Farm Mut. Auto Ins. Co. v. Pharr*, 808 S.W.2d 769, 771-72 (Ark. 1991). Louisiana, New Jersey and South Dakota apply the 'but-for' test in normal negligence cases; but, apply the substantial factor test in cases involving concurrent causes of harm. *Compare* *Perkins v. Entergy Corp.*, 782 So. 2d 606, 611-12 (La. 2001), *and* *Camp v. Jiffy Lube No. 114*, 706 A.2d 1193, 1195-96 (N.J. Super. Ct. App. Div. 1998), *with* *Leslie v. City of Bonesteel*, 303 N.W.2d 117, 119-20 (S.D. 1981). Oklahoma generally requires that the plaintiff meet the 'but-for' test; but, in loss of chance to survive situations the proximate causation standard is relaxed to the substantial factor test. *See* *McKellips v. St. Francis Hosp., Inc.*, 741 P.2d 467 (Okla. 1987). Surprisingly, Illinois allows a plaintiff to choose from between the substantial factor or 'but-for' test, *see* *Thacker v. UNR Indus., Inc.*, 603 N.E.2d 449, 455 (Ill. 1992); while Minnesota and Wisconsin, which adopted the substantial factor test, hold that adding the "but-for" test into jury instructions is not prejudicial error. *Compare* *Fehling v. Levitan*, 382 N.W.2d 901 (Min. Ct. App. 1986), *with* *Chapnitsky v. McClone*, 122 N.W.2d 400, 406-07 (Wis. 1963).

Other states stick to the original application of the substantial factor test and hold that the "but-for" test is applicable in all cases except those involving two independent torts, either of which is sufficient in and of itself to cause the injury, in which instance the substantial factor test is appropriate. *See* *Vincent by Staton v. Fairbanks Mem'l Hosp.*, 862 P.2d 847, 851-52 (Alaska 1993); *Fussell v. St. Clair*, 818 P.2d 295 (Idaho 1991); *Skinner*, 516 N.W.2d at 479, 481 n.8; *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 860-63 (Mo. 1993); *Young v. Flathead County*, 757 P.2d 772, 777 (Mont. 1988); *Johnson v. Egteadar*, 915 P.2d 271, 276 (Nev. 1996).

And yet still other states simply require that the plaintiff meet the 'but-for' test. *Y.H. Invs., Inc. v. Godales*, 690 So. 2d 1273, 1279 (Fla. 1997) (Wells, J., dissenting); *Bader v. Johnson*, 732 N.E.2d 1212, 1218 (Ind. 2000); *Johnson v. School Dist. of Millard*, 573 N.W.2d 116, 120 (Neb. 1998); *Skaling v. Aetna Inc. Co.*, 742 A.2d 282, 288 (R.I. 1999); *Banks v. Richmond*, 348 S.E.2d 280, 282 (Va. 1986). Not to mention the other states that apply the 'but-for' test as a part of the substantial factor test. *See* *Gerst v. Marshall*, 549 N.W.2d 810, 817 (Iowa 1996); *Bettencourt v. Pride Well Serv., Inc.*, 735 P.2d 722, 726 (Wyo. 1987). And lastly, some states employ both but-for and substantial factor in causation analysis. *See* *Smith v. State Comp. Ins. Fund*, 749 P.2d 462 (Colo. Ct. App. 1987); *Hallett v. Stone*, 534 P.2d 2323, 240 (Kan. 1975); *Webb v. Haas*, 728 A.2d 1261, 1267 (Me. 1999); *Cerullo v. Riverside Mall, Ltd.*, No. 96-0856D, 1998 Mass. Super. LEXIS 275, at *6 (Mass. Dist. Ct. Feb. 23, 1998); *Beilke v. Coryell*, 524 N.W.2d 607 (N.D. 1994); *Marathon Corp v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003); *Alder v. Bayer Corp.*, 61 P.3d 1068, 1090 (Utah 2002); *Sergent v. City of Charleston*, 549 S.E.2d 311, 320 (W. Va. 2001).

⁴² *See* *Reynolds v. Gonzalez*, 798 A.2d 67, 78-80 (N.J. 2002) (remanding the case for a new trial based on juror confusion with the terminology 'substantial factor'); *see also* *Roberts v. County of Westchester*, 717 N.Y.S.2d 276, 277 (App. Div. 2000) (stating that "it is clear that the jury was confused as to the meaning of the phrase 'substantial factor'"); *Kovit v. Estate of Hallums*, 261 A.D.2d 442, 446 (App. Div. 1999) (Friedmann, J., dissenting) (proposing that juries appear to be reading "substantial factor" as a synonym for percentage of fault, resulting in some peculiar verdicts); *Palmateer v. Whitcavitch*, 681 N.Y.S.2d 883, 884 (App. Div. 1998) (lamenting that the jury "continued to express

meaningless,⁴⁵ and imports an overly subjective standard into proximate cause.⁴⁶ Third, the substantial factor test has been misapplied in New York courts for over 20 years.⁴⁷ Fourth, the

confusion as to the meaning of the phrase 'substantial factor'"); *Mayer v. Goldberg*, 659 N.Y.S.2d 877, 878 (App. Div. 1997) (noting that jury, notwithstanding its conclusion that defendant's negligence was not substantial factor, still apportioned liability at 50%, rendering an award of \$250,000).

43 See *McDowell*, 448 P.2d at 871 (observing that the use of "substantial" in the jury instruction is "source of additional confusion injected into an already difficult area of law"). See generally *Prosser & Keeton*, *supra* note 10, at Supp. pp. 44-45 (noting that the substantial factor test is confusing).

44 See *Dorsaneo*, *supra* note 12 at 1530 (describing the substantial factor test as "vague and opaque"); see also *State v. Leroy*, 653 A.2d 161, 168 (Conn. 1995) (noting that the term "substantial" has been described as too "ambiguous" and "difficult" for a trial court to define). See generally *Culver*, 588 A.2d at 1099 (deducing "that the term substantial factor has a quantitative connotation").

45 See *Wright*, *supra* note 5 at 1132, n.29 (condemning the substantial factor formulation because it "does not 'resolve' anything" but "rather merely restates, confuses, and begs both the empirical issue of causal contribution and the normative issue of legal responsibility"); see also *Walker*, *supra* note 12 at 301 (concluding that the substantial factor test provides little guidance to fact finders). But see *Simpson v. Sisters of Charity of Providence*, 588 P.2d 4, 21-22 (Ore. 1978) (rejecting defense counsel's contention that the substantial factor jury instruction is "meaningless").

46 This subjective standard is more easily understood when the substantial factor test is compared to but-for causation.

The but-for test calls for a rather definite mental or analytical operation – asking whether the particular injuries probably still would have occurred had the particular negligent conduct not been engaged in. But with the substantial factor test, "we suspend our commitment to the analytical approach and use a term "substantial factor," that incorporates no particular mental operation but appeals forthrightly to instinct."

Robertson, *supra* note 10 at 1179. See *Walker*, *supra* note 12 at 307 n.3, in which the author notes that the but-for test has been criticized as an arbitrary but absolute hurdle when compared to the more flexible substantial factor test; see also *Conklin v. Hannonch Weisman*, 678 A.2d 1060, 1072-73 (N.J. 1996), which states that the substantial factor test allows the jury to account for intervening causes without being constrained by the strict causal chain required by the but-for test.

47 While it is not often the case where a court misinterprets law for such a lengthy amount of time, mistakes of long duration have occurred. For instance, in *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966), the Fourth Circuit dealt with a wrongful death medical malpractice case where the decedent's death was allegedly due to the failure of the defendant to diagnose a condition. See *id.* at 628. The court stated that "[i]f there was any substantial possibility of survival and the defendant has destroyed it, he is answerable." See *id.* at 632. Some courts interpreted this "substantial possibility" language to mean that where a plaintiff has less than an even chance of surviving (below 50%) and someone's negligence further diminishes that chance then the plaintiff could nonetheless recover full damages even though, more likely than not, the plaintiff would not have survived. *Hamil v. Bashline*, 392 A.2d 1280, 1287-88 (Pa. 1978), interpreted *Hicks* as permitting "the issue to go to the jury upon a less than normal threshold of proof." Furthermore, *O'Brien v. Stover*, 443 F.2d 1013, 1018 (8th Cir. 1971), relied on *Hicks* when affirming a plaintiff's verdict in a case where the plaintiff's own doctor testified the chance of plaintiff dying, at the time of the defendant's negligence, was 70%. See generally *Perrochet, Smith & Colella, Lost Chance Recovery And The Folly Of Expanding Medical Malpractice Liability*, 27 TORT & INS. L.J. 615, n.31 (1992), which cites over twenty courts interpreting *Hicks* so as to allow a loss of chance of survival recovery when the plaintiff, more likely than not, was not going to survive.

That interpretation of *Hicks* was a mistake, as the substantial possibility language in

substantial factor test can work injustice on defendants.⁴⁸ Lastly, an issue that I do not directly address in this Note, which has been the subject of scholarly criticism, is that the substantial factor test confuses causal contribution with the preponderance of evidence standard of proof and normative issues on the extent of legal responsibility.⁴⁹

II. ORIGIN OF THE SUBSTANTIAL FACTOR TEST

Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co.,⁵⁰ was the first case to use the substantial factor test.⁵¹ The plaintiff alleged that in August, 1918, the defendant's locomotive's engines started a fire in a bog close to the west side of the plaintiff's

Hicks was dicta. *See id.* Moreover, *Hicks* did not involve a loss of chance to survive action as the plaintiff was, more likely than not, going to survive but for the negligence of the doctor. *See Hicks*, 368 F.2d at 632. The most damaging evidence showing the fallacy of that interpretation is that even the Fourth Circuit, the authors of the *Hicks* opinion, acknowledged in *Murray v. United*, 215 F.3d 460, 464-65 (4th Cir. 2000), that courts adopted conflicting interpretations of the relevant *Hicks* language.

Consequently, courts were misinterpreting *Hicks* for at least 20 years because of the ambiguity in the "substantial possibility" language. *See id.* at 464. The correct interpretation of *Hicks* is that "substantial possibility" means the plaintiff's burden of proof is more probable than not. *See id.* at 464-65. It further connotes that a plaintiff is not required to prove to a *certainty* that had the defendant not been negligent the patient would have lived; rather, the plaintiff must prove that the decedent had a greater than 50% chance of living "in the absence of the defendant's negligence." *See id.* If it is possible for so many courts to misread the language of "substantial possibility" it is certainly likely the same mistake has been made when courts have interpreted the language of "substantial factor." After all, "substantial factor" and "substantial possibility" are only one word apart, both ambiguous and practically interchangeable.

⁴⁸ *See* Gerald W. Boston, *Toxic Apportionment: A Causation and Risk Apportionment Model*, 25 ENVTL. L. 549, 561 (1995) (offering a liability apportionment scheme in lieu of substantial factor test, under which defendants would be held liable only for their established contribution to plaintiff's harm instead of the entire award). *See generally* Calvin v. New York Medical Group, 286 A.D.2d 469 (App. Div. 2001) (suggesting that court's substantial factor basis for defendant liability resulted in unfair and excessive verdict for plaintiff). *But see* Danielle Conway-Jones, *Factual Causation in Toxic Tort Litigation: A Philosophical View of Proof and Certainty in Uncertain Disciplines*, 35 U. RICH. L. REV. 875, 889 (2002) (arguing substantial factor test is needed to adequately compensate deserving plaintiffs who cannot prove but-for causation).

⁴⁹ Wright, *supra* note 5, at 1097.

⁵⁰ 179 N.W. 45 (Minn. 1920).

⁵¹ *See* RESTATEMENT (THIRD) OF TORTS § 26 cmt. j (Tentative Draft No. 2, Mar. 25, 2002) (crediting *Anderson* as first adopting substantial factor test); *see also* Bert Black, *General Tort Principles: Duty and Proximate Cause: Role of Foreseeability: A New Metaphor for Clarifying the Difference Between Cause-in-Fact and Proximate Cause*, 10 KAN. J. L. & PUB. POL'Y 159, n.1 (2000) (stating substantial factor test was developed to address a perplexing fact pattern). *But see* Prosser & Keeton, *supra* note 10, at Supp., p. 45 (wondering if Jeremiah Smith foresaw all of the development on the substantial factor test when he published *Legal Cause In Actions Of Tort*, 25 HARV. L. REV. 103, which proposed the substantial factor formulation).

property.⁵² The plaintiff attempted to show this fire smoldered there until October 12, 1918 when it flared up and destroyed his property shortly before one of the great fires sweeping through Minnesota at the time did so.⁵³ The defendant, however, presented evidence showing that wind brought the great fires, which were also burning west of the plaintiff's property, to the plaintiff's premises and destroyed his property.⁵⁴ One of the several charges the jury received was as follows:

If you find that bog fire was set by the defendant's engine and that some greater fire swept over it before it reached the plaintiff's land, then it will be for you to determine whether that bog fire was a material or substantial factor in causing plaintiff's damage. If it was defendant is liable. If it was not, defendant is not liable. . . .⁵⁵

Hence, the substantial factor test was first applied in the circumstance where two fires converged, each of which was sufficient to cause the plaintiff's injuries.⁵⁶ A "but-for" instruction is useless in this situation because "but-for" the fire allegedly started by the defendants, the plaintiff's property still would have been destroyed by the great fire; and likewise, "but-for" the great fire the plaintiff's property still would have been ruined by the defendant's fire.⁵⁷ Therefore, under the "but-for" test we reach the unacceptable result that neither fire is considered a factual cause.⁵⁸ As such, solely using the substantial factor test

⁵² *Anderson*, 179 N.W. at 45-47 (restating the complaint).

⁵³ *See id.* at 47 (summarizing the plaintiff's case in chief).

⁵⁴ *See id.*

⁵⁵ *See id.* at 434.

⁵⁶ *See id.* (instructing the jury that if they found that the damage caused to the plaintiff was caused by the combination of fires, it should then decide whether the fire set by defendant was a "material or substantial factor in causing plaintiff's damage"); *see also* *McCool v. Davis*, 197 N.W. 93, 96 (Minn. 1924) (Holt, J. dissenting) (arguing for the application of substantial factor causation as formulated in *Anderson*); RESTATEMENT (THIRD) OF TORTS § 26 cmt. j (Tentative Draft No. 2, Mar. 25, 2002) (explaining substantial factor causation as originally formulated in *Anderson*).

⁵⁷ *See* *Wright*, *supra* note 5, at 1098 (asserting that if "but-for" test is used in this situation, then "neither fire contributed to the destruction of the plaintiff's house . . . because, if either fire had been absent, the house would or might have been destroyed anyway by the other fire"); *see also* *Mavroudis v. Pittsburgh-Corning Corp.*, 935 P.2d 684, 688 (Wash. Ct. App. 1997) (noting that in situations where conduct of either actor would be sufficient to cause harm to the plaintiff, but-for causation would erroneously absolve both actors). *See generally* PROSSER AND KEETON, *supra* note 10, at § 268 (discussing the substantial factor causation as a necessary alternative to but-for causation).

⁵⁸ *See* *Wright*, *supra* note 5, at 1098 (calling this result "absurd"); *see also* *Laines v. State*, 20 Fla. L. Weekly 2515 (Dist. Ct. App. 1995) (holding that the failure to allow

should be limited to these situations in which "but-for" causation does not work properly, i.e., where there are multiple causes of an event and where each cause could, by itself, cause the harm.⁵⁹

III. NEW YORK'S ADOPTION OF THE SUBSTANTIAL FACTOR TEST

However, New York has never limited the substantial factor test to situations involving multiple sufficient causation sets.⁶⁰ Judge Andrews, dissenting in *Palsgraf*,⁶¹ a case that did not deal with multiple sufficient causative sets, issued the first opinion in New York to use the terminology "substantial factor" for describing proximate causation.⁶² Similarly, in *Morse v. Buffalo Tank Corp.*,⁶³ Judge Lehman dissented using the substantial factor language.⁶⁴ It was not until *Dunham v. Canisteo*⁶⁵ that a

substantial factors to satisfy factual causation would lead to absurd results); *Mavroudis*, 935 P.2d at 688 (noting that but for causation would absolve two substantial-factor causes when both qualify equally as cause in fact).

⁵⁹ The reporter's notes to the RESTATEMENT (THIRD) OF TORTS § 26 cmt. j. concludes that "with the sole exception of multiple sufficient causes" the substantial factor test "provides nothing of use in determining" causation. The reporter's notes also recognize that the RESTATEMENT (SECOND) OF TORTS "exacerbated" the confusion as to the correct application of substantial factor. For an explanation on the RESTATEMENT (SECOND) OF TORTS see *infra* Part IIIC. For a general synopsis on the proper use of the substantial factor test see Robertson, *supra* note 10, at 1776-81.

⁶⁰ See, e.g., *Speller v. Sears, Roebuck & Co.*, 790 N.E.2d 252 (N.Y. 2003) (allowing recovery in products liability where no other independently sufficient cause is claimed); *Merino v. New York City Transit Auth.*, 675 N.E.2d 1222, 1224 (N.Y. 1996) (upholding verdict in which a single defendant was not held liable in absence of proof that defendant's negligence was "substantial factor in causing [the] injury"); see also *Palsgraf v. Long I. R. Co.*, 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting) (referring to "substantial factors" as a measure of proximate cause).

⁶¹ 162 N.E. at 104.

⁶² See *id.* at 103-06 to get a full sense of Judge Andrews' understanding of proximate cause. Judge Andrews advocated that courts ask seven questions when determining proximate cause. See *id.* All of the questions, including the one dealing with substantial factor, went towards the attenuation of a cause. See *id.* The seven questions were:

[w]hether there was a natural and continuous sequence between cause and effect? Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce the result? Or by the exercise of prudent foresight could the result be foreseen? Is the result too remote from the cause, and here we consider remoteness in time and space.

Id. at 104. See generally *Johnson v. State*, 334 N.E.2d 590, 593 (N.Y. 1975) where the court followed the same formulation of proximate causation that was used in *Palsgraf*. "The actor's conduct is a legal cause of harm to another if his conduct is a substantial factor in bringing about the harm, and there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in harm."

⁶³ 19 N.E.2d 981 (N.Y. 1939).

⁶⁴ See *id.* at 986.

⁶⁵ 303 N.Y. 498 (1952).

majority of the Court of Appeals used the “substantial factor” language in an ordinary negligence claim.⁶⁶

A. Dunham

The facts of *Dunham* were as follows: On March 3, 1949 – a windy and bitterly cold day – the seventy-six year old plaintiff, Charles Lee Dunham, began drinking a bottle of whisky at approximately 4:00 in the afternoon.⁶⁷ At some point in the next forty-five minutes he fell and seriously injured his hip.⁶⁸ The fire commissioner discovered him on the fire station’s floor at about 4:45 p.m.⁶⁹ After notifying the mayor, chief of police, and superintendent of the streets that an individual was suffering from the cold in the fire station, all of these men (not knowing of Dunham’s injured hip), carried the intoxicated, partially unconscious, partially sleeping man to a cot in the village jail.⁷⁰ This action was taken not to arrest Dunham, but to keep him in a warm place until he was able to go home.⁷¹ At this point, Dunham started complaining about his hip but declined to see a doctor. At a later point during the night, however, Dunham, asked for a doctor, while moaning in pain.⁷² Dunham was finally taken to a hospital in an ambulance at 9:00 a.m. on March 4th.⁷³ Dunham died seven days later on March 11th.⁷⁴

⁶⁶ See *id.* at 506 (declining to hold as a matter of law that delay of treatment for eighteen hours to seventy-six year old seriously injured man was not substantial factor in causing his death).

⁶⁷ See *id.* at 501 (discussing that prior to being dropped off in front of the post-office with a bottle of whiskey, decedent had one drink then put bottle in his pocket).

⁶⁸ See *id.* at 500-01 (stating that the only person who saw Mr. Dunham prior to his fall testified that he saw decedent walking through on alley, staggering from one side to the other, and that in his opinion Mr. Duncan was intoxicated).

⁶⁹ See *id.* at 500 (noting that when fire commissioner asked him if he was hurt, the answer was incoherent and he appeared to be suffering from the cold).

⁷⁰ See *id.* (explaining that after decedent was carried to jail, he reported that he had fallen in front of Red Front grocery store).

⁷¹ See *id.* at 501 (stating that mayor and police chief decided that no charge should be placed against Mr. Dunham because he had done no harm, however, they would keep him in jail where it was warm, as he was unable to go home).

⁷² See *id.* at 500-01 (finding that when asked by one of the witnesses, between 2:00 and 3:00 in the morning, after Mr. Dunham had asked for a doctor, and why he did not get one, officer said, “it was no use at this time of the morning and it wouldn’t do any good if we did”).

⁷³ See *id.* at 501 (clarifying that police chief Stephens, according to his testimony, became aware that decedent was injured about 9:00 in morning when he complained that his leg hurt and noticed he was unable to get around).

⁷⁴ See *id.* (quoting the death certificate signed by the attending physician that stated that the disease of condition directly leading to the death was terminal bronchial

One of the issues in the case was whether the negligence of the town's officers in failing to procure medical attention for eighteen hours was a proximate cause of Dunham's death.⁷⁵ While the expert, Dr. Otto K. Stewart, indicated "that the delay of eighteen hours [contributed] to [Dunham's] death," he further testified that even if Dunham had received the best medical care at 4:45 p.m. on March 3rd, he very well may have died.⁷⁶

The plaintiff, therefore, did not prove that failure to provide immediate medical attention to Dunham was a condition precedent to Dunham's death.⁷⁷ Despite this lack of causative proof, the Court refused to "say, as a matter of law, in view of the doctor's testimony, that the delay in this case of eighteen hours . . . was not a substantial factor for the jury to consider in determining" causation.⁷⁸

B. Nallan

After *Dunham*, the substantial factor test was scarcely used in the 1950's;⁷⁹ however, it started being used with increasing consistency in the 1960's and 1970's.⁸⁰ It was not until 1980, and

pneumonia and listing as the antecedent causes due to pneumonia were fractured right hip and right elbow).

⁷⁵ Outlining two questions presented:

First, was the Village of Canisteo . . . guilty of negligence in failing to ascertain for some eighteen hours, while the decedent lay on a cot in the village jail, that he had been injured and was in need of medical attention?

Second: If the Village of Canisteo and Stephens were negligent, was that negligence the proximate cause of decedent's death?

See id. at 502.

⁷⁶ *See id.* (satisfying the court's conscience in the sense that "the main point of his testimony was that the delay of eighteen hours did contribute to this man's death").

⁷⁷ By failing to meet this burden, the defendant was entitled to a favorable judgment because the plaintiff, more likely than not, would have died anyway. *See id.* at 876. The court, by holding that the defendant's negligence was a proximate cause of the plaintiff's injury, specifically on the grounds that the defendant contributed to the plaintiff's injury, thereby changed the causation element of negligence. *See id.* The plaintiff did not need to prove the defendant caused his injuries by *substantially* contributing to them; but, only that the defendant contributed to his injuries. *See id.* In essence, the holding of the case is that "contribution" and "substantial factor" are two separate ways of describing proximate cause.

⁷⁸ *Dunham*, 104 N.E.2d at 877.

⁷⁹ *See Firman v. Sacia*, 184 N.Y.S.2d 945, 947 (App. Div. 1959) (rejecting application of substantial factor test because it was unsupported by persuasive authority). *But see*, e.g., *Callwood v. Consolidated Edison Co.*, 142 N.Y.S.2d 290, 291 (App. Div. 1955) (concluding that "the jury could reasonably infer that the dripping of the water from the roof was a substantial factor in bringing about the ice condition on the sidewalk"); *Rugg v. New York*, 131 N.Y.S.2d 2, 6 (App. Div. 1954) (applying the substantial factor test to negligently caused injuries of motorist).

⁸⁰ *See Codling v. Paglia*, 298 N.E.2d 622, 628-29 (N.Y. 1973) (using the substantial

the case of *Nallan v. Helmsley-Spear, Inc.*,⁸¹ that the Court of Appeals explicitly adopted the substantial factor test for determining proximate causation.⁸²

1. The Facts of *Nallan*

William Nallan was a member and officer of the International Alliance of Theatrical and Stage Employees Union for several years.⁸³ In the months preceding September 30, 1969, Nallan began investigating certain inconsistencies in union practices, which he believed were evidence of internal union corruption.⁸⁴ Due to his investigation two threats were made on his life.⁸⁵

On September 30, 1969, at approximately 7:15 p.m., Nallan arrived at New York City's Fisk building, for a regular union business meeting.⁸⁶ As per routine, Nallan went to sign in at the lobby desk.⁸⁷ Normally, an attendant signed individuals into the building, but because the attendant was elsewhere performing janitorial duties,⁸⁸ Nallan signed himself in.⁸⁹

As Nallan was signing his name he heard a gunshot, which was accompanied by a "burning sensation in his back."⁹⁰ After the shot was fired, more than one individual was seen running out of the building.⁹¹ No one was ever arrested for the attempted assassination, and Nallan was incapacitated requiring nursing care for several subsequent months.⁹²

factor test for causation in strict products liability action); *Jacobson v. Gimbel Bros.*, 296 N.E.2d 804, 804 (N.Y. 1973) (providing that liability is incurred if defendant's negligence was a substantial factor in causing the plaintiff's injury); *Derdiarian v. Felix Contracting Co.*, 419 N.Y.S.2d 656, 658 (App. Div. 1979), *aff'd*, 414 N.E.2d 666 (N.Y. 1980) (concluding that it is for the factfinder to decide if the negligence was a substantial factor in bringing about the harm).

⁸¹ 407 N.E.2d 451 (N.Y. 1980).

⁸² *See id.* at 459 (stating that it was plaintiff's burden to show that defendant's conduct was a substantial causative factor).

⁸³ *See id.* at 454 (stating that Nallan had been an officer in Theatrical Local 52 of that union).

⁸⁴ *See id.* (noting that these investigations resulted in hiring of would-be assassin, whose conduct precipitated present action).

⁸⁵ *See id.* (stating that these incidents were reported to police, and thereafter, Nallan no longer felt that his life was in serious jeopardy).

⁸⁶ *See id.* (noting that the owner of the Fisk building is, in fact, a defendant in this action).

⁸⁷ *See id.* at 457.

⁸⁸ *See id.*

⁸⁹ *See id.* at 455.

⁹⁰ *See id.*

⁹¹ *See id.*

⁹² *See id.*

2. Issues and Analization

One question in the case was whether the lobby attendant's absence was a proximate cause of Nallan's injury.⁹³ Shockingly, the Court concluded that a jury could find the absence of the lobby attendant to be a proximate cause of Nallan's injuries.⁹⁴ The factual basis of the legal holding was expert testimony indicating lobby officials⁹⁵ might deter criminal conduct.⁹⁶

While there was evidence showing a lobby attendant could possibly deter some criminal conduct, the Court overlooked the fact that there was no evidence tending to show that if the attendant were present in the lobby then the attempted assassination, probably, would not have occurred.⁹⁷ In fact,

⁹³ See *id.* at 458.

⁹⁴ See *id.* at 459.

⁹⁵ The Court of Appeals clarified that the lobby official in this instance is merely an employee of the building who is not accountable for security. See *id.* at 458. The Appellate Division, Second Department, in *Nallan v. Helmsley-Spear, Inc.*, 412 N.Y.S.2d 650, 652 (2d Dept. 1979), *rev'd*, 407 N.E.2d 451 [hereinafter *App. Div. Nallan*], expounded further by noting the superintendent's testimony:

The building superintendent testified at the trial that the attendant, who was approximately 60 years old at the time of the incident, was stationed in the lobby after 6:30 p.m. for two reasons: (1) to clean the lobby and polish the elevators; and (2) to take charge of the sign-in desk which was maintained in the lobby after 7:00 p.m. The attendant's duties with regard to the sign-in desk were totally ministerial. He was merely instructed to direct all late visitors to sign in and out of the building. The avowed purpose of this procedure was to help locate the occupants of the building in the event of a fire or other emergency.

App. Div. Nallan at 652.

⁹⁶ See *Nallan*, 407 N.E.2d at 459.

⁹⁷ The Court of Appeals and the Second Department disagreed over the plaintiff's expert's testimony. The Court of Appeals stated:

Here, there was expert testimony in the record that the mere presence of an official attendant, even if unarmed, would have had the effect of deterring criminal activity in the building's lobby. This was so, according to the plaintiff's expert, whether the crime in question was one of random violence or was a deliberate, planned "assassination" attempt such as apparently occurred in this case. The clear implication of the expert testimony was that a would-be assailant of any type would be hesitant to act if he knew he was being watched by a representative of the building's security staff. Contrary to the reasoning of the majority at the appellate division, it would seem to us that the deterrent effect described by plaintiff's expert would exist whether the lobby guard was a "trained observer" or, as here, was an ordinary attendant with no special expertise in the area of building security, since that fact would make no difference from the potential assailant's point of view.

Nallan, 407 N.E.2d at 459. The Second Department's analysis, which includes the actual testimony, was as follows:

Finally, though the uncontradicted testimony of plaintiff's security expert was to the effect that the presence of even an unarmed attendant in the lobby would have discouraged the apparent assassination attempt, an examination of his trial testimony reveals that this conclusion was predicated in large part on the assumption that the person so stationed would be a trained observer whose primary or sole function would be to maintain surveillance of the front door. Thus, it was

because there were other individuals present in the lobby, it seems highly unlikely that an unarmed lobby attendant or doorman would have averted the attack.⁹⁸ As a result, there is no way Nallan could prove that the absence of a lobby attendant was a condition precedent to the firing of the assassin's bullet.⁹⁹ Nevertheless, the Court allowed the action to commence and noted that the plaintiff's burden of proof was limited to a showing "that defendant's conduct was a substantial causative factor in the sequence of events that led to Nallan's injury."¹⁰⁰

As authority for using "substantial factor" for causation the court cited the Restatement (Second) of Torts § 430.¹⁰¹ However,

stated: "Q. What then is needed, so to speak, to provide and to have the deterrent effect that your are describing? A. The key deterrent effect results just from the presence of a human being who is alert and is paying attention to watching people come in and seeing to it that they do whatever it is that has to be done in regard to signing in. They don't have to be in uniform, they don't have to be armed. Q. They have to be maintaining observation and being on duty at the entranceway, the front doors? A. Yes." Clearly, the attendant's job here was not of this nature, as he was permitted (in fact, required) to leave the desk unattended for varying periods of time in order to discharge his custodial duties.

App. Div. Nallan, 412 N.Y.S.2d at 654.

⁹⁸ See *id.* (adding that "the lobby at the time of the shooting was not totally unoccupied, as plaintiff's associate, Mr Dobbins, was also present"); see also *Nallan*, 407 N.E.2d at 454-55 (noting that several individuals were seen running from the building after the shots were fired).

⁹⁹ The condition precedent aspect of the substantial factor test is found in the Restatement (Second) Of Torts, which states: "the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent." RESTATEMENT (SECOND) OF TORTS § 432(1) (1965). This issue is addressed by the Second Department when in holding that there was not a breach of care on the defendants part, reasoned,

It has *not* been established in this case that the attendant's alleged prime breach of care, i.e., his failing to lock the front door when leaving the lobby, was an event of causal significance, since the plaintiff has been unable to show that his assailant entered the building through the unlocked door during the attendant's absence.

App. Div. Nallan, 412 N.Y.S.2d at 654. In coming to this conclusion, the Court cited *Bernal v. Pinkerton's Inc.*, 382 N.Y.S.2d 769 (App. Div. 1976), *aff'd*, 363 N.E.2d 362 (N.Y. 1977), where a gate to plaintiff's building was left unguarded by the guards employed by Pinkerton Inc., through which an intruder entered and later caused injury. *Id.* In *Bernal*, the court similarly reasoned "it cannot be said that the absence of the guard (who, incidentally, was not required to be armed) from his station was the proximate cause of the shooting" *Id.* at 770.

¹⁰⁰ *Nallan*, 407 N.E.2d at 459.

¹⁰¹ RESTATEMENT (SECOND) OF TORTS § 430 (1965). The Court of Appeals also cited to *Prosser on Torts*. See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS WILLIAM L. PROSSER § 42 (4th ed. 1971). However, *Prosser & Keeton on Torts*, specifically advises against using "substantial factor." He explains:

Using [the substantial factor test] as a substitute for satisfying a "but for" requirement seems likely to create confusion. This usage blends the substantive requirement ("but for" or a substitute for "but for" causation) with the requirement of proof ("preponderance of the evidence" or a substitute for that standard of proof). Such a blending seems likely to distract from a clear focus upon the disputed policy

it is sections 431 and 432 that examine substantial factor.¹⁰² Furthermore, a careful reading of the Restatement (Second) shows that the Court misinterpreted the contours of how the drafters intended the substantial factor test to be applied.¹⁰³

C. The Court of Appeals Misinterpreted the Restatement

The Restatement (Second) of Torts § 431, on its face, portrays that an “actor’s negligent conduct is a legal cause of harm to another if his conduct is a substantial factor in bringing about the harm. . . .”¹⁰⁴ But, comment (a) to section 431 clarifies that in order to be a legal cause of another’s harm an actor’s negligence must be a necessary condition AND a substantial factor,¹⁰⁵

issues upon which each of these judicial choices is based – one about the substantive rule and the other about the burden of proof.

PROSSER & KEETON *supra* note 10, at § 41.

¹⁰² The RESTATEMENT (SECOND) OF TORTS § 431 (1965) states:

The actor’s negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

RESTATEMENT (SECOND) OF TORTS § 431 (1965).

The RESTATEMENT (SECOND) OF TORTS § 432 (1965) reads:

(1) Except as stated in Subsection (2), the actor’s negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent. (2) If two forces are actively operating, one because of the actor’s negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor’s negligence may be found to be a substantial factor in bringing it about.

RESTATEMENT (SECOND) OF TORTS § 431 (1965).

¹⁰³ In holding that a jury could make out a *prima facie* case, the Court of Appeals reasoned that “the jury in this case might well have inferred from the available evidence that the absence of an attendant in the lobby at the moment plaintiff Nallan arrived was a ‘proximate’ cause of Nallan’s injury.” *Nallan*, 407 N.E.2d at 460. The Restatement (Second) of Torts outlines one set of criteria for substantial factor. *See* RESTATEMENT (SECOND) OF TORTS, § 431 (1965). Three different uses of the term “substantial factor” can be identified in the second Restatement, adding to the confusion of the term. *See generally* Robertson, *supra* note 10 at 1176. It is suggested that the only fully legitimate usage of the term, the narrowest, is that which describes a cause-in-fact test used as a substitute for the but-for test in cases where two acts caused an injury, and each one acting independently would have caused the injury. *See id.* at 1776. In *Nallan*, it appears the court used the second usage of the term identified in the Restatement, noted as “a looser and potentially confusing usage, the substantial factor test is treated as more or less interchangeable with the but-for test; in this usage courts seem to feel that it is appropriate to shift to the substantial factor vocabulary whenever the but-for test is proving difficult to work with for whatever reason.” *See id.* A third type of usage deals with the issue of duty, separate from cause-in-fact. *See id.*

¹⁰⁴ RESTATEMENT (SECOND) OF TORTS § 431(a) (1965).

¹⁰⁵ *See id.* at cmt. a (stating that “[i]n order to be a legal cause of another’s harm, it is not enough that the harm would not have occurred had the actor not been negligent The negligence must also be a substantial factor in bringing about the plaintiff’s harm”);

"except as stated in § 432(2)." ¹⁰⁶ Section 432(2) removes the necessary condition requirement, allowing substantial factor to be the sole test in proving causation, where "two forces are actively operating to inflict harm, one because of the actor's negligence, and the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another." ¹⁰⁷

As a consequence, the Restatement (Second) does not support a causation test based solely on "substantial factor," but requires that both "substantial factor" and "but for" be used when determining proximate causation. ¹⁰⁸ Only when there are multiple sufficient causes does the Restatement (Second) advocate exclusively using the substantial factor test. ¹⁰⁹

Accordingly, the Court of Appeal's reliance on the Restatement (Second) for precedent that all Nallan had to prove was that the defendant's conduct "was a substantial causative factor in the

see also RESTATEMENT (SECOND) OF TORTS § 432(1) (including within the substantial factor test the condition precedent requirement when stating "the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent").

¹⁰⁶ RESTATEMENT (SECOND) OF TORTS § 431, cmt. a.

¹⁰⁷ RESTATEMENT (SECOND) OF TORTS § 432(2); *see* Wright, *supra* note 5, at 1079 (explaining that necessary condition requirement is synonymous with but-for reasoning, and insufficient for determining causation where there were simultaneous, independently tortuous conditions as determined by Jeremiah Smith in developing substantial factor reasoning); *see also* Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1775 (1985) (noting "The test reflects a deeply rooted belief that a condition cannot be cause of some event unless it is, in some sense, necessary for occurrence of the event").

¹⁰⁸ *See* Barbara A. Spellman & Alexandra Kincannon, *The Relation Between Counterfactual ("But-For") And Causal Reasoning: Experimental Findings And Implications Jurors' Decisions*, 64 LAW & CONTEMP. PROBS. 241, 255 n.54 (2001) (stating that the "Restatement is somewhat unclear; it seems to require "but-for" casualty to qualify as a substantial factor except in cases of multiple sufficient causes"); *see also* Lawrence Joseph, *The Causation Issue In Worker's Compensation Mental Disability Cases: An Analysis, Solutions, And A Perspective*, 36 VAND. L. REV. 263, 276 n.47 (1983) (surmising that the Second Restatement's substantial factor requirement "includes the 'necessary antecedent' concept"). *But see* Karen L. Chadwick, "Causing" Enhanced Injuries In Crashworthiness Cases, 48 SYRACUSE L. REV. 1223, 1226-27 (1998) (interpreting the Restatement (Second) to mean that a defendant's conduct is a substantial factor if the defendant's conduct satisfies the "but-for" test); *See generally* PROSSER & KEETON, *supra* note 10, at 43 n.352 (describing three different interpretations of phrase "substantial factor" and stating second use "proposes to deny liability for insubstantial contributions, even when "but for" causal relation is established).

¹⁰⁹ *See* Joseph, *supra* note 108 (quoting the Restatement (Second)); *see also* RESTATEMENT (SECOND) OF TORTS § 432. *See generally* RESTATEMENT (THIRD) OF TORTS § 26, reporter's notes, cmt. j. (Tentative Draft No. 2, 2002) (counseling against continued use of substantial factor standard but "in the instance of multiple sufficient causes, however, the substantial-factor test can be useful because it substitutes for the but-for test in a situation in which the but-for test fails to accomplish what law demands").

sequence of events that led to" his injuries was wrong.¹¹⁰ In fact, because Nallan's situation did not involve multiple causes, like *Anderson*,¹¹¹ then under the Restatement (Second) Nallan had to prove that the defendant's conduct was a substantial factor in bringing about the harm and that the harm would not have occurred had the lobby attendant been in the lobby.¹¹²

It is partially due to this type of misapplication of the Second Restatement's substantial factor test that the Restatement (Third) is markedly moving away from using any "substantial factor" language.¹¹³ However, while the authors of the Restatement (Third) do severely criticize substantial factor, they do acknowledge that the sloppy language and configuration of the Restatement (Second) contributed to confusion on how the substantial factor test was intended to be applied.¹¹⁴

IV. WHAT DOES "SUBSTANTIAL FACTOR" MEAN?

Ask yourself, is 25 a substantial part of 100? Now ask yourself what number should be considered a substantial part of 100? These questions are important because juries are consistently asked to determine if a defendant's negligent conduct rises to the

¹¹⁰ See RESTATEMENT (SECOND) OF TORTS §§ 431-432; Robert N. Strassfeld, *If... Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 354 n.73 (1992) (acknowledging that the Restatement (Second) "adopts a substantial-factor formula, but it also requires that an actor's conduct be a necessary cause of the harm to qualify as a substantial factor, except in cases of two active forces operating concurrently where each is sufficient to cause the harm").

¹¹¹ *Anderson v. Minneapolis, S. P. & S. S. M. Ry. Co.*, 179 N.W. 45 (Minn. 1920).

¹¹² See RESTATEMENT (SECOND) OF TORTS § 431, cmt. a (stating that "[i]n order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent. . . the negligence must also be a substantial factor in bringing about the plaintiff's harm"); Joseph, *supra* note 108 (citing the Restatement (Second) for the proposition that "[t]he but-for test is necessary but not sufficient to prove the existence of a 'substantial factor' causal relation"); see also RESTATEMENT (THIRD) OF TORTS § 26, reporter's notes, cmt. j (Tentative Draft No. 2, 2002) (emphasizing that the "essential requirement, recognized in both Torts Restatements, is that the party's tortious conduct be a necessary condition. . . for the occurrence of the plaintiff's harm").

¹¹³ The Restatement Third notes that the substantial-factor test over time has proven confusing in its application. See RESTATEMENT (THIRD) OF TORTS § 26 reporter's notes cmt. j. (Tentative Draft No. 2, 2002); see also Wright, *supra* note 5, at 1073, which notes that the Restatement (Second) suffers from structural flaws. See generally Ian Gallacher, *Hazardous Substance Litigation in Maryland: Theories of Recovery and Proof of Causation*, 13 J. CONTEMP. HEALTH L. & POLY 423, 443 (1997), which explains that the criticism of the "substantial factor" test as an insufficient standard to measure the relevance or the sufficiency of evidence.

¹¹⁴ See RESTATEMENT (THIRD) OF TORTS § 26 reporter's notes cmt. j. (Tentative Draft No. 2, 2002).

level of being "substantial."¹¹⁵ This amounts to asking juries to define "substantiality."¹¹⁶

A. Defining the Word "Substantial"

At least one jury actually regretted not sending for a dictionary after their misunderstanding of the word substantial resulted in a plaintiff who was unjustly prohibited from collecting damages.¹¹⁷ In *Moisakis v. Allied Building Products Corp.*,¹¹⁸ the plaintiffs sought to recover damages for personal injuries.¹¹⁹ After the verdict dismissing the complaint was announced, and the jurors were discharged, the plaintiffs' attorney and the jurors conversed.¹²⁰ The jurors claimed they were confused by the term "substantial factor."¹²¹ The plaintiffs' attorney brought the matter before the judge.¹²² After a hearing, the judge, in a very unorthodox procedure, required all of the jurors to return the following week for questioning.¹²³

The Court asked the jurors if they were confused about anything and one juror responded, "[s]ubstantial' threw us off a bit. We thought the question was substantially, meaning 100

¹¹⁵ See N.Y. PJI 2:70 (3d ed. 2003). See generally *Hageman v. Santasiero*, 716 N.Y.S.2d 485, 486 (App. Div. 2000) (quoting the N.Y. PJI 2:70 for the description of proximate cause); *Ohdan v. City of New York*, 706 N.Y.S.2d 419, 422 (App. Div. 2000) (explaining that in order to find that defendant's negligence was proximate cause of plaintiff's harm, jury must determine if negligence was substantial factor in bringing about harm as defined in Pattern Jury Instructions).

¹¹⁶ See N.Y. P.J.I. 2:70 (2003). See generally *Acerra v. Trippardella*, 311 N.Y.S.2d 522, 525 (App. Div. 1970) (holding that definition of "substantial factor" found in Pattern Jury Instructions meets requirements dictated by earlier case law); *DiMaggio v. M. O'Connor Contr. Co.*, 668 N.Y.S.2d 449, 450 (Sup. Ct. 1998) (overturning an inconsistent jury verdict due to confusion regarding definitions of terms in Pattern Jury Instructions, namely, proximate and substantial cause).

¹¹⁷ See *Moisakis v. Allied Building Products Corp.*, 697 N.Y.S.2d 100, 104 (App. Div. 1999) (stating jurors claimed they were confused by term "substantial factor" on verdict sheet and requested new sheet during deliberations citing an error had been made on first sheet); see also John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1201 (2002) (quoting exchange between court and jurors in *Moisakis*). See generally *Clarke v. Order of the Sisters of St. Dominic* 710 N.Y.S.2d 108, 109 (App. Div. 2000) (citing *Moisakis* and noting new trial should be granted where jury encounters substantial confusion when rendering verdict).

¹¹⁸ 697 N.Y.S.2d 100 (App. Div. 1999).

¹¹⁹ See *id.* (stating that plaintiffs appealed from judgment of Kings County Supreme Court dismissing their personal injury action).

¹²⁰ See *id.* at 102 (indicating plaintiffs' attorney wanted to discern why jury found the way they did).

¹²¹ See *id.* at 101.

¹²² See *id.*

¹²³ See *id.* at 101.

percent, but it wasn't that way."¹²⁴ The Court then asked all the jurors if they felt the same way. The jurors responded with a resounding "[y]es," and added that "[t]he word 'substantial' threw us off."¹²⁵ Juror Number Four ended the questioning session by stating, "[t]he word 'substantial' threw us off. We were fighting about the meaning of 'substantial.' We should have sent for a dictionary."¹²⁶

However, even if the jury had sent for a dictionary it probably would not have clarified the meaning of "substantial" within the jury instruction. After all, dictionaries give varying definitions of the word "substantial."¹²⁷ If the jury had sent for a dictionary this is what they would have seen:

Substantial \ *adj* 1 A : consisting of, relating to, sharing the nature of, or constituting substance : existing as or in substance : MATERIAL B : not seeming or imaginary : not illusive : REAL, TRUE C : being of moment : IMPORTANT, ESSENTIAL 2 A : adequately or generously nourishing : ABUNDANT, PLENTIFUL B : possessed of goods or an estate : moderately wealthy : WELL-TO-DO; *often* : having a good and well maintained income producing property C : considerable in amount, value, or worth 3 A : having good substance : firmly or stoutly constructed : STURDY, SOLID, FIRM B : having a solid or firm foundation : soundly based : carrying weight 4 A : being that specified to a large degree or in the main B : of or relating to the main part of something SYN see MASSIVE¹²⁸

Hence, the "substantial factor" test could be any one of the following: the "not-imaginary/real factor" test, the "important factor" test, the "generous factor" test, the "solid factor" test, or the "massive factor" test.¹²⁹

¹²⁴ *Id.* at 104.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1993) (representing one of the definitions of the "substantial" to be "not seeming or imaginary"); CAMBRIDGE ADVANCED LEARNER'S DICTIONARY (2003), <http://dictionary.cambridge.org/define.asp?key=79480&dict=CALD> (indicating one of meanings of "substantial" to be "relating to main or most important things to be considered"); Dictionary.com at <http://dictionary.reference.com/search?q=substantial> (stating meaning of "substantial" to include "true or real; not imaginary").

¹²⁸ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1993) at 1389.

¹²⁹ See *id.*; see also *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 361 (3d Cir. 1999) (repeating the district court's jury instruction that "A substantial factor is a real actual

B. Jury Interpretation of "Substantial"

As a result of varying understandings of "substantial", it is no wonder that in *Kovit v. Estate of Hallums*,¹³⁰ Judge Friedmann made the following observation about how juries interpret the meaning of the term "substantial factor":

Trial judges have recently been reporting that juries appear to be reading "substantial factor" as a synonym for percentage of fault. This has resulted in some peculiar verdicts, which can only be explained as arising from the juror's belief that causality, and therefore, fault, is established only when a defendant's negligence has been substantial, i.e., greater than 50%. Conversely, juries seem to be concluding that a degree of negligence falling below 50% is not sufficiently substantial to constitute the proximate cause of the mishap.¹³¹

These findings explain how the Pattern Jury Instructions explain "substantial factor":

An act or omission is regarded as a cause of an injury if it was a substantial factor in bringing about the injury, that is, if it had such an effect in producing the injury that reasonable people would regard it as a cause of the injury. *There may be more than one cause of an injury, but to be substantial, it cannot be slight or trivial. You may, however, decide that a cause is substantial even if you assign a relatively small percentage to it.*¹³²

factor even though the result may be unusual, unforeseen, unforeseeable or unexpected but it is not an imaginary or fanciful factor having no connection or only an insignificant connection with the injury"); *McDowell v. Davis*, 448 P.2d 869, 871 (Ariz. 1968) (stating that "Webster's Third International Dictionary Unabridged, notes a number of varying meanings for the word 'substantial' – among these it is defined as "not imaginary, not illusive." Were we certain that it would be understood in this sense, or in the sense of "insignificant", a litigant would have little cause to complain. However, Webster also defines "substantial" as "abundant, plentiful and considerable in amount", at 2280. Commonly, we speak in terms of a substantial amount as in a substantial meal or a substantial income. If this meaning is attributed to the word, the instruction is palpably erroneous as inducing the concept of largeness as opposed to smallness"). See *generally* *Battenfeld v. Gregory* 247 N.J. Super. 538, 547 (1991) (stating "substantial factor" cannot be quantified in percentage terms).

¹³⁰ 690 N.Y.S.2d 82 (App. Div. 1999).

¹³¹ *Id.* at 85–86 (Friedmann J., dissenting) (explaining that there has been a change in way courts have described term substantial factor to juries and how this may have caused jury here to reach their verdict through faulty reasoning).

¹³² N.Y. PJI 2:70 (3d ed. 2001) (emphasis added); see also *Stewart v. New York City Health & Hosp. Corp.*, 616 N.Y.S.2d 499, 499 (App. Div. 1994) (holding cause only has to be more than slight for damages to be sustained); *Lewis v. AMTRAK*, 675 N.Y.S.2d 504,

This instruction attempts to clarify the meaning of “substantial factor,” but in the process creates a contradiction. If a proximate cause cannot be slight or trivial, how can it be relatively small? The adjectives small, slight and trivial are synonymous.¹³³ Hence, these jury instructions offer little guidance and a lot of hypocrisy on the meaning of substantial factor.

C. The “Subjective Factor” Test?

As a consequence, no clear legal standard exists on how to interpret “substantial” and the determination of substantial factor is based solely on the varying subjective lay-opinions of jurors.¹³⁴ Therefore, in the interests of honesty and accuracy, the “substantial factor” test should be renamed the “subjective factor” test in order to more precisely describe the process of how causation is analyzed.¹³⁵

V. NEW YORK'S USE OF SUBSTANTIAL FACTOR

Furthermore, New York has incorrectly “accepted the proposition that, although the plaintiff cannot show the defendant’s tortious conduct was a but-for cause of harm by a preponderance of the evidence, the plaintiff may still prevail by showing that the tortious conduct was a substantial factor in causing the harm.”¹³⁶ This is demonstrated by analyzing medical malpractice cases where sympathetic plaintiffs are able to recover from defendants who were negligent, but whose negligence was not a condition precedent to the plaintiff’s

506 (N.Y. Civ. Ct. 1998) (reciting that a negligent act can be a substantial factor in bringing about an injury if it was even a slight cause of the injury).

¹³³ See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2142, 2449-450 (1993) (giving the definitions of each word and showing them to have similar meanings); Dictionary.com, at www.dictionary.com (last visited October 10, 2003) (defining all three words to have a similar meaning); Thesaurus.com, at www.thesaurus.research.com (last visited October 10, 2003) (listing small, slight, and trivial as synonyms).

¹³⁴ See Robertson, *supra* note 10, at 1779 (explaining how substantial factor test appeals only to instinct); see also Kovit v. Estate of Hallums, 690 N.Y.S.2d 82, 82 (App. Div. 1999) (stating it was not reasonable to find only one defendant had been substantial factor of plaintiff’s injury when both parties had been negligent); Moisakis v. Allied Building Products Corp., 697 N.Y.S.2d 100, 104 (App. Div. 1999) (explaining that jury can easily become confused as to practical meaning of substantial factor).

¹³⁵ See *supra* Part IVA-B; see also *supra* note 46.

¹³⁶ RESTATEMENT (THIRD) OF TORTS § 26, cmt. j (Tentative Draft No. 2, 2002) (comparing different ways in which substantial factor test has been applied and showing existence of inconsistent methods of application in many different jurisdictions).

injuries.¹³⁷

A. Cavlin

In *Cavlin v. New York Medical Group*,¹³⁸ a married thirty-six year old woman with a two-year-old son, went to the defendant, Dr. Marvin Witt, and complained of a dry, hacking cough.¹³⁹ Dr. Witt departed from the acceptable standard of medical conduct by not getting her entire medical history and failing to take an X-ray of her chest.¹⁴⁰ The doctor diagnosed the woman with a post-viral bronchial irritation, gave her a bronchodilator and asked her to return in four weeks.¹⁴¹

The woman, however, returned in four days complaining of the same symptoms.¹⁴² The doctor provided a comparable examination, but this time prescribed a narcotic cough syrup.¹⁴³ Nine days later, thirteen days after her original visit to Dr. Witt, the woman's mother took her to a different doctor.¹⁴⁴

The new doctor performed a chest X-ray, which disclosed a mediastinal mass.¹⁴⁵ The mass was high-grade non-Hodgkin's lymphoma.¹⁴⁶ A few days later the woman died of complications directly linked to the high-grade non-Hodgkin's lymphoma.¹⁴⁷ A large jury verdict was returned in the plaintiff's favor.¹⁴⁸

¹³⁷ See, e.g., *Cavlin v. New York Medical Group*, 730 N.Y.S.2d 337, 339 (App. Div. 2001) (stating plaintiffs only needed to show doctor's negligence resulted in probable reduction in decedent's chances for survival); *Stewart v. New York City Health & Hosp. Corp.*, 616 N.Y.S.2d 499, 499 (App. Div. 1994) (stating patient did not have to prove that hospital's negligence deprived her of ability to conceive and bear children naturally, only that hospital's negligence was proximate cause of loss of her right fallopian tube and that such negligence deprived her of substantial possibility of that ability); *Kadyszewski v. Ellis Hosp. Assoc.*, 595 N.Y.S.2d 841, 842 (App. Div. 1993) (determining to establish prima facie case based solely on circumstantial evidence, it was enough that patient showed facts and conditions from which negligence of hospital and causation of accident could reasonably be inferred).

¹³⁸ 730 N.Y.S.2d 337 (App. Div. 2001).

¹³⁹ See *id.* at 338.

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² See *id.* at 338 (indicating that the decedent's dry, hacking cough was neither alleviated nor cured by the doctor's initial diagnosis).

¹⁴³ See *id.* (demonstrating that the doctor failed to take a chest x-ray upon the decedent's second visit to the office).

¹⁴⁴ See *id.* at 338.

¹⁴⁵ See *id.*

¹⁴⁶ See *id.* (proving practicing good and accepted standards of medical care, which includes taking chest x-ray, would have revealed mediastinal mass in decedent's chest).

¹⁴⁷ See *id.*

¹⁴⁸ The plaintiffs, the woman and her son, received a jury verdict for \$1,437,775. See

Despite the fact that the decedent was not going to survive the condition, the court held that the negligence of the doctor in not ordering an X-ray resulting in a thirteen-day delay in diagnosis caused the woman's death.¹⁴⁹ The court justified this result under the rubric of substantial factor.¹⁵⁰ The court stated that all the plaintiff had to prove to establish that the defendants were 100% liable for all the damages was that it was probable that a tiny bit of a diminution in the woman's chance of surviving occurred.¹⁵¹ In other words, if the chance of the woman surviving was one percent, and after the doctor's negligence it was less than one percent, the defendant is wholly the cause of the woman's death and the plaintiff is entitled to a full recovery.¹⁵²

While no money in the world could return the child's mother, it is hardly justice to conclude the doctor is responsible for the mother's death. The high grade non-Hodgkin's lymphoma is what

id.

¹⁴⁹ *See id.* at 338.

¹⁵⁰ *See id.*

¹⁵¹ *See id.* (indicating plaintiff did not have to eliminate every other possible cause of decedent's death and merely had to show that it was probable that some attenuation in chance of survival had occurred).

¹⁵² This case should have been analyzed under the newly emerging doctrine called "Loss of Chance to Survive," which has not been addressed directly in New York courts. *But see* Birkbeck v. Central Brooklyn Medical Group, No. 4598/97, 2001 NY slip op. 40133U, 2001 N.Y. Misc. LEXIS 368, at **1 (N.Y. Sup. Ct. Aug. 22, 2001), for a New York case that addresses loss of chance to survive in an incorrect setting, i.e., the expert testimony indicated that if the plaintiff was properly diagnosed he had a greater than 50% chance of surviving.

The "Loss of Chance to Survive" doctrine allows plaintiffs to recover from negligent doctors for the decrease in a chance of surviving an injury or disease when more likely than not, the plaintiffs were going to incur the harm anyway. For example, in *Smith v. Louisiana*, the decedent went for a foot treatment when the doctors discovered cancer in his chest. 676 So.2d 543 (La. 1996). The decedent's chance of survival at this diagnosis ranged from one to twenty-five percent; however, the hospital failed to notify the decedent for 15 months resulting in the decedent's chance of survival falling below one percent. *See id.* at 546. The court held that although the plaintiffs could not show that "but-for" the doctor's negligence the decedent would have survived, the plaintiffs were allowed to recover for the value of the loss of the chance of surviving, which was a separate compensable injury. *See id.* at 547; *see also* Jorgenson v. Vener, 616 N.W.2d 366 (S.D. 2000). The court recognized lost chance as a compensable injury where a plaintiff must still prove by a preponderance of the evidence that the defendant's actions reduced her chance of a better outcome, and therefore subjects the physician to liability only for the extent that the physician contributed to the harm. *See id.* at 372.

Not all courts treat the diminution in the chance of survival as a separate compensable injury; some courts allow recovery only a percentage basis for the lost chance following Joseph H. King, Jr., *Causation, Valuation and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981). The Second Department, rather than ignoring the condition precedent requirement, should have addressed a "Loss of Chance to Survive" action and allowed recovery while considering the loss of chance to survive as a separate cause of action.

caused the mother's death.¹⁵³ Moreover, even if the doctor had correctly performed a chest X-ray and identified the mass, the mother probably would not have survived.¹⁵⁴ The court awarded an extremely sympathetic plaintiff the verdict because of the unfair widespread notion that it is undesirable to allow doctors to get away with committing any type of negligence.¹⁵⁵

B. Stewart

Stewart v. New York City Health & Hosp. Corp.,¹⁵⁶ is another case where a doctor's negligence created liability even though the doctor's negligence was not a condition precedent to the plaintiff's injury.¹⁵⁷ The defendant departed from accepted medical standards by failing to diagnose the plaintiff's ectopic pregnancy.¹⁵⁸ This resulted in a ruptured right fallopian tube.¹⁵⁹

¹⁵³ See *Cavlin*, 730 N.Y.S.2d at 338 (highlighting results of decedent's chest X-Ray). See generally *Ferrari v. Lutheran Med. Ctr.* 653 N.Y.S.2d 374, 375 (App. Div. 1997) (noting decedent's death was 'directly and indirectly' caused by non-Hodgkin's lymphoma); *Flaughner v. Mercy Hosp. Corp.*, No. 92-CA2056, 1993 Ohio App. LEXIS 3936 (Ohio Ct. App. Aug. 13, 1993) (stating lymphoma caused decedent's death).

¹⁵⁴ See *Davenport v. County of Nassau*, 719 N.Y.S.2d 126, 127-28 (App. Div. 2001) (dismissing plaintiff's complaint because plaintiff failed to raise a triable issue of fact by not rebutting the defense's medical expert affidavits that contended that the six-week delay in the stage IV non-Hodgkins lymphoma diagnosis "did not affect the decedent's prognosis, which would have been essentially the same even had the malignancy been found six months earlier"); see also *Flaughner v. Mercy Hosp. Corp.* 1993 Ohio App. LEXIS 3936, at *3-5 (Ct. App. 1993) (recanting the testimony of Dr. Harris, the plaintiff's expert's, who could not state to a reasonable degree of medical certainty that if the decedent was diagnosed with the high grade non-Hodgkins lymphoma approximately 20 days earlier, upon a first visit, that the decedent would probably have lived). See generally *Bushman v. State Mut. Life Ins. Co.*, 915 F. Supp. 945, 947 (N.D. Ill. 1996) (defining lymphoma as "a malignancy of the lymphoid cells in lymph nodes [that can be] originally situated in lymph nodes almost anywhere in the body," and explaining that lymphomas are of two types, Hodgkins and non-Hodgkins, with non-Hodgkins being of three types – low, intermittent, or high grade).

¹⁵⁵ See Marshall B. Kapp, *Medical Error Versus Malpractice*, 1 DEPAUL J. HEALTH CARE L. 751, 755 (1997) (noting even physicians themselves, in their professionally socialized 'culture of infallibility,' impose considerably higher standards of care on themselves and their colleagues: namely, perfection); Sharon W. Murphy, *Contributory Negligence in Medical Malpractice: Are the Standards Changing to Reflect Society's Growing Health Care Consumerism?*, 17 DAYTON L. REV. 151, 151, 152 (1991) (stating higher standards of care are put upon physicians than upon other tortfeasors, yet noting courts are more willing to hold patients to higher degree of responsibility due to recent heightened consumer awareness of health issues). See generally Twila Kleim, *Physician's for Professional Sports Teams: Health Care Under the Pressure of Economic and Commercial Interests*, 9 SETON HALL J. SPORTS L. 196, 202 (1999) (advocating higher standards of care for team physicians).

¹⁵⁶ 616 N.Y.S.2d 499 (App.Div. 1994).

¹⁵⁷ See *id.* at 499 (finding defendant hospital liable for loss of child-rearing capacity after undiagnosed ectopic pregnancy ruptured patient's right fallopian tube).

¹⁵⁸ See *id.* (clarifying departure from acceptable medical practices deprived plaintiff of substantial possibility of natural birth). See generally Martin A. Qwan et al., *The*

The plaintiff's expert refused to quantify the plaintiff's chance of getting pregnant if the doctor had not been negligent other than to say that the chance was less than fifty percent, but the defense expert calculated the possibility of her getting pregnant at somewhere between five and ten percent.¹⁶⁰

On appeal, the First Department reinstated the plaintiff's verdict despite the fact that the plaintiff probably would never have gotten pregnant.¹⁶¹ In an action for the loss of childbearing capacity, the court made the astounding declaration that the plaintiff did not have to prove that defendant's negligence was the proximate cause of her inability to bear children.¹⁶² "Rather, plaintiff merely had to prove that defendant's negligence was the proximate cause of the loss of plaintiff's right fallopian tube."¹⁶³ If the jury concluded that the loss of a five to ten percent chance of having a pregnancy was 'substantial' then the defendant is liable.¹⁶⁴

The reasoning of the First Department is faulty because the doctor's negligence was not a condition precedent to the plaintiff's inability to have children.¹⁶⁵ More likely than not, the plaintiff

Diagnosis of Ectopic Pregnancy, AM FAM PHYSICIAN, Feb. 1985, at 201-07 (stating recent developments in pregnancy testing have enabled physicians to make easy, accurate diagnoses of ectopic pregnancies, and also stating ectopic pregnancies render large percentage of survivors infertile); Lee Rothberg, *The Frightening Costs of Ectopic Pregnancy*, RN, Jan. 1985, at 48 (discussing how to diagnose ectopic pregnancies).

¹⁵⁹ See *Stewart*, 616 N.Y.S.2d at 499 (extrapolating said rupture resulted from defendant's failure to diagnose). See generally Daniel Ing Hsu Wu & Alvin Langer, *Ectopic Pregnancy*, AM. FAM. PHYSICIAN, Oct. 1982, at 161-66 (stating when tubal pregnancies are diagnosed in young women who wish to remain fertile, techniques should further avoid damage to fallopian tubes); Jane E. Brody, *Ectopic Pregnancy: Increasing Hazard*, N.Y. TIMES, May 9, 1984, at 1 (stating early recognition and treatment of ectopic pregnancies are essential due to eventual rupture).

¹⁶⁰ See *Stewart*, 616 N.Y.S.2d at 499 (showing debate over plaintiff's chance of successful uterine pregnancy). See generally Ana M. Schaper et al., *Ectopic Pregnancy Loss During Fertility Management*, W. J. OF NURSING RESEARCH, Oct. 1996, at 503 (stating ectopic pregnancy threatens future fertility); *Ectopic Pregnancy*, HEALTHTIPS, Sept. 1989, at 5 (stating with today's medical knowledge, ectopic pregnancies are far less likely to result in death or infertility).

¹⁶¹ See *Stewart*, 616 N.Y.S.2d at 499.

¹⁶² See *id.* (concluding plaintiff did not have to prove defendant's negligence deprived her of the ability to conceive).

¹⁶³ *Id.*

¹⁶⁴ See *id.*

¹⁶⁵ See *id.* The defendant's expert in the case stated that the plaintiff's chance of naturally bearing a child prior to the doctor's negligence was around five to ten percent. See *id.* As such, she was almost unable to naturally bear a child prior to the doctor's negligence and therefore his negligence could not have been a condition precedent to her inability to have children. See *id.*

would never naturally bear a child.¹⁶⁶ Additionally, the court said that five percent can, as a matter of law, be a substantial factor.¹⁶⁷ If five percent can be a substantial factor, can 1 percent or less also be a substantial factor?

C. Kadyszewski

In *Kadyszewski v. Ellis Hosp. Assoc.*,¹⁶⁸ a 67 year old plaintiff who was suffering from hip and thigh pain was admitted into the defendant hospital under the care and treatment of her own private doctor.¹⁶⁹ On December 22, 1985, at roughly 4:15 a.m., the plaintiff needed to use the lavatory.¹⁷⁰ For thirty minutes she attempted to call for help and at around 4:45 she went, on her own, to the bathroom.¹⁷¹ The plaintiff got out of bed, grabbed her walker, and proceeded to her final destination.¹⁷² As she approached her room's door she collapsed, falling just inside the doorway where she was later found by a nurse.¹⁷³ She suffered a fractured left hip.¹⁷⁴

Liability was alleged upon the hospital for failing to follow its own rules, by not providing the plaintiff with topside rails on her bed during the night.¹⁷⁵ The Third Department reinstated the plaintiff's cause of action, noting that if the failure to provide a bed rail could constitute negligence it could also "have been a substantial factor in bringing about the injury."¹⁷⁶ The court justified this result by dismissing the "but-for" test as a "self-

¹⁶⁶ See *id.* (noting defendant's expert, who stated plaintiff's chance for naturally bearing child before doctor's negligence was only five to ten percent).

¹⁶⁷ See *id.* (stating jury verdict for plaintiff would be justified if jury found a five percent loss in plaintiff's ability to naturally bear child and jury decided that this was "substantial").

¹⁶⁸ 595 N.Y.S.2d 841 (App. Div. 1993).

¹⁶⁹ See *id.* at 842 (stating plaintiff was suffering from left hip and thigh pain as well as anxiety and depression).

¹⁷⁰ See *id.* (noting plaintiff was medicated by hospital staff with Demoral, Visitril, Motrin and Phenobarbital on the evening immediately preceding plaintiff's excursion to bathroom).

¹⁷¹ See *id.* (discussing how plaintiff stated she called for assistance for half hour to help her to bathroom before attempting to go by herself).

¹⁷² See *id.* at 843-44 (Levine, J., dissenting) (highlighting affidavit of plaintiff, which stated the same).

¹⁷³ See *id.* at 844 (Levine, J., dissenting) (noting how plaintiff completed act of getting out of bed, proceeded almost out of the room before she fell).

¹⁷⁴ See *id.* at 842.

¹⁷⁵ See *id.* at 843 (stating since hospital violated its own rule, by not providing bed rails, there is question of fact as to issue of their liability).

¹⁷⁶ *Id.*

serving declaration,"¹⁷⁷ and glancing over the fact that side rails were never intended to prevent this type of accident.¹⁷⁸

The bedrails were designed to prevent elderly patients from inadvertently falling out of their beds and not to keep patients confined in bed.¹⁷⁹ Hence, even if a side rail were in place it "would *not* have prevented plaintiff from leaving her bed to go to the bathroom."¹⁸⁰ Therefore, the absence of a bedrail was not "a" or "the" cause of the plaintiff's injury.¹⁸¹

D. Increased Insurance Costs

Cavlin, *Stewart* and *Kadyszewski* all demonstrate how the "rich" doctor and "big bad" hospital have been held liable for events that would have occurred with or without the hospital's negligence.¹⁸² With decisions like these, it is no wonder medical malpractice is in a current state of disarray.¹⁸³ The proper way to limit the increasing costs in the medical industry is not to cap

¹⁷⁷ *Id.* (belittling the defendant's argument, which was "that bed rails, even if properly placed, would not have prevented plaintiff from leaving the bed and that their purpose is solely to prevent plaintiff from falling out of bed and not from leaving the bed . . . [as] . . . a self-serving declaration by defendant in support of its position in this lawsuit").

¹⁷⁸ *See id.* at 844 (Levine, J., dissenting) (explaining bed rails will not prevent person from getting out of bed, if they are physically capable of doing so).

¹⁷⁹ *See id.* (Levine, J., dissenting) (pointing out "[o]ther mechanical restraints are used to prevent patients from purposely getting out of bed").

¹⁸⁰ *Id.* at 844.

¹⁸¹ *See id.* (emphasizing violation of hospital rule in not erecting bed rails "merely furnished the condition or occasion for the occurrence of the accident").

¹⁸² *See Cavlin v. New York Med. Group*, 730 N.Y.S.2d 337, 338 (App. Div. 2001) (considering a 13 day delay in diagnosis of non-Hodgkins lymphoma to be a proximate cause of plaintiff's death even though a timelier diagnosis probably would not have saved her life); *Kadyszewski*, 595 N.Y.S.2d at 843 (holding the jury could find that the hospital's failure to place side rails on the plaintiff's bed was the proximate cause of plaintiff's fall even though the fall would have occurred if the side rails were placed on the plaintiff's bed); *see also Stewart v. New York City Health & Hosp. Corp.*, 616 N.Y.S.2d 499, 499 (App. Div. 1994) (considering 5 percent to be a substantial factor).

¹⁸³ *See Impact of Litigation on Healthcare Access: Hearings on H.R. 4600 Before the Subcomm. On Health, Comm. Of House Energy & Commerce* (2002) (statement of Lauren Townsend, Executive Director, Coalition for Consumer Justice); *see also* Mark F. Grady & Paul C. Weiler, *Better Medicine Causes More Lawsuits, and New Administrative Courts Will Not Solve the Problem*, 89 NW. U. L. REV. 1068, 1069 (1992) (describing how approximately one-half of all medical malpractice claims generate some payment); Scott Forehand, *Helping the Medicine Go Down: How a Spoonful of Mediation Can Alleviate the Problems of Medical Malpractice Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 907, 908 (1999) (advocating current medical malpractice systems do not deter future physician negligence). *See generally* M. Gregg Bloche, *The Invention of Health Law*, 91 CALIF. L. REV. 247, 250 (2003) (commenting on national health policy disarray and chaos); Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463, 464 (2002) (noting "that the field of health care law lacks cohesion").

damages in lawsuits, but to require an increased burden on plaintiffs to concentrate on the actual negligence of the doctors and show that their negligence was in fact the cause of the injury.¹⁸⁴

VI. A PROPER JURY INSTRUCTION

As a consequence of the unjust results, confusion associated with the substantial factor test, and the importance of the condition precedent requirement, the author proposes a new jury instruction. I have taken into account many scholarly works¹⁸⁵ and the proposed jury instruction is the product of a desire for simplification and clarity.¹⁸⁶

A. *What Is Left Out of the Jury Instruction*

In order for a jury instruction to be straightforward, the terms “proximate cause,” “legal cause,” and “substantial factor” must be omitted. The problems with the term “proximate cause” are twofold.¹⁸⁷ First, the term implies that legal responsibility

¹⁸⁴ See generally Bill Brubaker, *Doctors' Insurance Soars, Then Disappears; Physicians Blame Lawsuits, Awards*, WASH. POST, May 10, 2003, at E01 (explaining medical industry crisis); *Caps May Not be Answer to Malpractice Mess*, NEWSDAY (N.Y.), Jan. 26, 2003, at A22 (suggesting there is evidence that proves capping lawsuits will not solve financial problems in medical field such as insurance costs); Anne E. Kornblut, *Bush Wants Cap on Malpractice Awards Partisan Issue Touches '04 Presidential Race*, BOSTON GLOBE, Jan. 16, 2003, at A3 (specifying why putting caps on medical malpractice damages will not necessarily improve medical industry's financial problem).

¹⁸⁵ See *infra* Part VI.A-B. See generally Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instruction*, 79 COLUM. L. REV. 1306, 1307 (1979) (discussing difficulty of understanding jury instructions); Walker, *supra* note 12, at 247 (clarifying that the “substantial factor” jury instruction is vague and inadequate); Wright, *supra* note 5, at 1072 (promulgating the need for clarification in the causation area of tort law).

¹⁸⁶ The concept of simplifying jury instructions is certainly not new. See Charrow, *supra* note 185, at 1335; see also THE JURY PROJECT: REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 106-07 (Colleen McMahon, ed., 1994); J. Clark Kelso, *Report: Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1443, 1516 (1996). The jury instruction I propose is a model “but-for” causation jury instruction and typically juries do not have problems with the “but-for” counterfactual reasoning. See Spellman & Kincannon, *supra* note 108, at 264 (2001).

¹⁸⁷ See generally Charles M. Cork, III, *Annual Survey Of Georgia Law June 1, 2001 - May 31, 2002: A Better Orientation For Jury Instructions*, 54 MERCER L. REV. 1, 53 (2002) (describing Georgia proximate cause instruction as “mind-numbing”); Walter W. Steele & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure To Communicate*, 67 N.C. L. REV. 77 (1988) (demonstrating empirically juror confusion with proximate cause instructions); Kenneth Vinson, *Proximate Cause Should Be Barred From Wandering Outside Negligence Law*, 13 FLA. ST. U. L. REV. 215 (1985) (advocating the elimination of the proximate cause concept, calling it “common law leviathan”).

attaches to the cause of an event that is spatially and temporally nearest.¹⁸⁸ Second, a study has shown that almost one-quarter of subjects interpreted the term "proximate cause" to mean "approximate cause" or estimated cause.¹⁸⁹

Similarly, the term "legal cause" is not included within the proposed jury instruction because it has been shown, in the same study, to misrepresent the law.¹⁹⁰ One-quarter of those interviewed contrasted the term "legal cause" with illegal cause.¹⁹¹ As a result, legal cause is not an appropriate phrase in

¹⁸⁸ See Wright, *supra* note 5, at 1074 (noting use of phrase "proximate cause" erroneously implies proximate cause of harm must be one that is spatially or temporally near, or even nearest, to harm); see also Mitchell v. Gonzales, 819 P.2d 872, 877 (Cal. 1991) (observing "proximate" is an unfortunate word that places erroneous emphasis on physical or mechanical closeness); Fraijo v. Hartland Hosp., 160 Cal. Rptr. 246, 255 (Ct. App. 1971) (commenting on belief that "proximate" confuses juries by placing undue emphasis on "nearness").

¹⁸⁹ See Charrow, *supra* note 185, at 1353 (discussing study's results); see also Mitchell, 819 P.2d at 877 (citing Charrow article); Robert L. Winslow, *The Instruction Ritual*, HASTINGS L.J. 456, 468 (1962) (referring to frequent lay misinterpretation of "proximate cause" to be "approximate cause").

¹⁹⁰ See Charrow, *supra* note 185, at 1353 (noting that the use of "legal cause" causes juror misrepresentation). See generally PROSSER & KEETON, *supra* note 10, at 272-80 (examining historical confusion with causation terminology); Stapleton, *supra* note 5, at 957 (describing difficulties surrounding use of phrase "legal cause").

¹⁹¹ The Supreme Court of California recognized the poor construction in their jury instruction:

We recognize that BAJI No. 3.76 is not perfectly phrased. The term "legal cause" may be confusing. As part of the psycholinguistic study referred to above the experimenters rewrote BAJI No. 3.75 to include the term "legal cause." The study found that "25% of the subjects who heard 'legal cause' misinterpreted it as the opposite of an 'illegal cause'." We would therefore recommend that the term 'legal cause' not be used in jury instructions.

See Mitchell, 819 P.2d at 879; Charrow, *supra* note 185, at 1353. Professor Logan further explains that:

Many a 1L has been frustrated trying to learn legal cause. There are various reasons for this, not the least of which is the confusion caused by the tendency of judges (and some scholars) to use the term as shorthand for two very different issues. The first issue involves the plaintiff's obligation to prove that her injury was "caused" by defendant's tortious conduct. This "actual cause" or "cause-in-fact" inquiry asks whether the defendant's conduct was a necessary antecedent to the plaintiff's injury, and involves the sufficiency of proof. Of course, public policy issues inhere in what type of proof is acceptable, how much is needed, and so forth, but the core inquiry is empirical in nature and involves the marshaling of brute facts to answer the "but/for" question: would the plaintiff's injury have occurred absent defendant's misconduct? Lack of proof of such a causal link precludes liability despite blameworthy conduct. The second issue, legal cause, is more centrally a matter of public policy. Even if the plaintiff can prove that the defendant's tortious conduct was a cause-in-fact of the plaintiff's injury, the defendant may nevertheless be excused from liability for some or all of the resulting injuries. The black letter of legal cause asks whether the plaintiff's injury was sufficiently foreseeable at the time of the defendant's misconduct to justify liability. But this, like most black letter law, is deceptively simple.

David A. Logan, *Masked Media: Judges, Juries, and the Law of Surreptitious News-gathering*, 83 IOWA L. REV. 161, 210-11 (1997).

jury instructions.¹⁹² Finally, “substantial factor” has been left out of the proposed jury instruction due to the jury confusion that it causes.¹⁹³

B. The Instruction

The following instruction, which concludes this Note, is not to be used where there are two sufficient causal sets. Moreover, the instruction presumes that duty and breach (negligence) have already been explained to the jury. And, as was stated in the Introduction, the following jury charge is to be used in conjunction with other charges on foreseeability, intervening and superseding causes, etc. . . The following is the instruction:

I am now going to instruct you¹⁹⁴ on how to determine if¹⁹⁵ the plaintiff, by the greater weight of the evidence,¹⁹⁶ has proven cause. The law defines cause in its own particular way.¹⁹⁷ The

¹⁹² See Charrow, *supra* note 185, at 1353; see also Mitchell, 819 P. 2d at 879 (suggesting that the term “legal cause” should not be used in jury instructions); Stapleton, *supra* note 5, at 957 (describing “legal cause” as incoherent amalgam of elements).

¹⁹³ See *supra* Part IV; see also, e.g., *Moisakis v. Allied Bldg. Prods. Corp.*, 697 N.Y.S.2d 100, 101 (1999) (describing juror confusion with the “substantial factor” language). See generally Wright, *supra* note 5, at 1038 (discussing the misleading effect of the “substantial factor rubric”).

¹⁹⁴ See Charrow, *supra* note 185, at 1342 (suggesting “I am now going to tell you” is a good way to describe judge’s duty to jury). See generally Steele & Thornburg, *supra* note 187 (describing the judge’s role in instructing the jury on the law); Peter Tiersma, *The Rocky Road To Legal Reform: Improving The Language Of Jury Instructions*, 66 BROOK. L. REV. 1081, 1112 (2001) (beginning a proposed jury instruction with “I will now explain the presumption of innocence”).

¹⁹⁵ See Charrow, *supra* note 185, at 1352 (explaining when not used as conditional, unlike here, “if” confuses people). See generally Debra R. Cohen, *Competent Legal Writing – A Lawyer’s Professional Responsibility*, 67 U. CIN. L. REV. 491, 495-96 (1996) (assessing criticisms of legal writing, including convoluted sentences and tortuous phrasings, which prevent effective communication of author’s meaning); Hon. Gail Hagerty, *Viewpoint: Instructing the Jury? Watch Your Language!*, 70 N. DAK. L. REV. 1007 (1994) (advising jury instruction language should avoid complex, unorganized sentence structure).

¹⁹⁶ The “greater weight of the evidence” is simpler and easier to understand than “preponderance.” This terminology is taken from the North Carolina Pattern Jury Instructions for Civil Cases. See N.C. P.I. CIV. 102.10 (1994); see also THE JURY PROJECT, *supra* note 186, at 107, which recommends that courts eschew jury instructions “couched in outmoded and unfamiliar language or that are tautological.” Charrow, *supra* note 185, at 1336, also advises that difficult lexical terms should be replaced with simple synonyms or phrases; while Steele & Thornburg, *supra* note 190, at 100, describes the inherent generality of certain concepts of law that often defy description, including the phrase “preponderance of the evidence.”

¹⁹⁷ See Charrow, *supra* note 185, at 1353 (recommending that this language be utilized when instructing the jury on “proximate cause”); see also Mitchell v. Gonzales, 819 P.2d 872, 879 (Cal. 1991) (quoting Charrow); JOHN M. DINSE, RITCHIE E. BERGER AND FREDERICK S. LANE III, CALIFORNIA JURY INSTRUCTIONS, CIVIL: BOOK OF APPROVED JURY INSTRUCTIONS (9th ed. 2003) (utilizing this language). See generally Steele & Thornburg, *supra* note 187, at 100 (pointing out law students spend months learning causation while

law considers a defendant's act or omission to be regarded as a¹⁹⁸ cause of the plaintiff's injury if, and only if,¹⁹⁹ the defendant's act or omission had such an effect in producing the injury that reasonable people would regard the defendant's negligence as a cause of the injury.²⁰⁰ In other words, you must²⁰¹ use the evidence presented in this case, your life experience, and your common sense²⁰² to consider if the *plaintiff's harm*²⁰³ would have

jurors are expected to comprehend complicated notions of causation based on limited – and limiting – instructions).

198 It is proper to use the phrase “a cause” and not “the cause” to avoid the implication that there can be only one cause. See *Argentina v. Emery World Wide Delivery Corp.*, 715 N.E.2d 495, 498 n.2 (N.Y. 1999), where the New York Court of Appeals explains: “The certified question states ‘the’ proximate cause, which implies the sole proximate cause of the injury. Since there may be more than one proximate cause of an injury (see, *Forte v. City of Albany*, 279 NY 416, 422; PJI 2:71), we consider the question to ask whether the vehicle was ‘a’ proximate cause of the injury.” New York is not the only jurisdiction to make such an observation. See, e.g., *Stickley v. Chisolm*, 765 A.2d 662, 666-67 (Md. Ct. Spec. App. 2001); *Balandzich v. Demeroto*, 519 P.2d 994, 998 (Wash. Ct. App. 1974); *Alvarado v. Serssch*, 662 N.W.2d 350, 358 n.5 (Wis. 2003) (Sykes, J., dissenting).

199 I have taken this language from the NESS (necessary element of a sufficient set) test. This test states “a condition contributed to some consequence if and only if it was necessary for the sufficiency of a set of existing antecedent conditions that was sufficient for the occurrence of the consequence.” Wright, *supra* note 5, at 1102-03.

The judge delivering this jury instruction should emphasize this part of the instruction with a change in the pitch of his or her voice in order to maximize the impact. See Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries And Real Trials In Wyoming*, 33 LAND & WATER L. REV. 59 (1998), where it is explained that:

Many of the attorneys who participated in the study commented that judges can influence jurors' perceptions of the jury instructions by the manner in which they read them, and that at least some of the judges read the instructions to jurors with little inflection, emphasis or apparent enthusiasm. Common sense also suggest that jurors will not be as likely to remain attentive if the judges instruct them in a manner that seems monotonous or disinterested. Judges may thus help improve the instruction process by “spicing up” their delivery of the instructions. Potential innovations include: (1) reading with more varied tone and more frequent pauses for emphasis; and (2) using a visual aid (e.g. a projected overhead image of the instruction being read) to accompany the oral presentation of the instruction. Some judges have also reported achieving good results by leaving the bench and reading the instructions from the podium, in front of the jury box, to stimulate jury interest and attentiveness.

Id. at 112-13.

200 See RESTATEMENT (SECOND) OF TORTS § 431 cmt. a; see also N.Y. PJI 2:70 (3d ed.).

201 A linguistic construction that apparently enhances jurors' comprehension is the use of “modal” verbs, specifically “must,” “should,” and “may,” in phrases relating to the jurors' duties.” Charrow, *supra* note 189, at 1324.

202 The purpose of the substantial factor test is to allow juries “to draw conclusions about causation from the evidence and from common sense.” See John C. P. Goldberg & Benjamin C. Zipursky, *Concern for Cause: A Comment on the Twersli-Sebok Plan for Administering Negligent Marketing Claims Against Gun Manufacturers*, 32 CONN. L. REV. 1411, 1414 (2000). Hence, the substantial factor test's purpose is positive; the problem is that it functions vaguely. It has been said that the “substantial factor instruction's ‘heart’ might be in the right place, but its mind is elsewhere.” Walker, *supra* note 12, at 301.

occurred even if the defendant *acted properly*.²⁰⁴ If you conclude the *plaintiff's harm*²⁰⁵ would have happened anyway then you must²⁰⁶ find that the defendant's negligence is not a²⁰⁷ cause. However, if the *plaintiff's injury*²⁰⁸ only occurred as a result of the defendant's negligent conduct then you must²⁰⁹ find that the defendant's negligence is a cause.

Therefore, while I advocate for the death of the terminology "substantial factor," I believe its spirit should live on.

²⁰³ The court must be meticulous at identifying the plaintiff's exact harm and inserting it here. Identifying the plaintiff's injury is the first step in performing a "but-for" analysis. See Robertson, *supra* note 10, at 1770. Although this is a seemingly simple step, it must be done by the court. See *id.* at 1771. For example, in *Stewart v. New York City Health & Hosp. Corp.*, 616 N.Y.S.2d 499 (App.Div. 1994), the court needed to either describe the plaintiff's injury as her inability to get pregnant or the loss of a chance of getting pregnant. This description will have a major impact on the verdict because the fact finder must decide whether the defendant caused that particular injury.

²⁰⁴ It is the court's job to correct the defendant's mistake. See Robertson, *supra* note 10, at 1769-74. Robertson explains, in a five-step process, the art of but-for causation. The steps, in summary, are, (1) identifying the injury; (2) identifying the exact act or omission that the defendant is charged with; (3) correcting only the defendant's wrongful conduct in step 2 so that the defendant's conduct is lawful; (4) asking the question of whether the plaintiff's injuries still would have occurred had the defendant behaved according to (3); and (5) answering the question. The jury only answers the question. It is the court that formulates everything else and when the court formulates the question in part (4) it goes into the jury instruction here.

²⁰⁵ See *supra* note 203.

²⁰⁶ See *supra* note 201.

²⁰⁷ See *supra* note 198.

²⁰⁸ See *supra* note 203.

²⁰⁹ See *supra* note 201.

